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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 14

COMMONWEALTH COATINGS CORPORATION,

Petitioner,

—v.—

CONTINENTAL CASUALTY COMPANY, FIREMAN'S FUND INSURANCE COMPANY and A. C. SAMFORD OVERSEAS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

EMANUEL HARRIS
Attorney for Petitioner
30 Vesey Street
New York, N. Y. 10007
Telephone 212—267-5700

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Justices of the Supreme Court:

Petitioner Commonwealth Coatings Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled action on September 27, 1967.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is reported at 382 F. 2d 1010. The opinion of the United States District Court for the District of Puerto Rico is unreported. Copies of said opinions are appended hereto. (Appendixes "A" and "B".)

Jurisdiction of the Court

Jurisdiction to review the said judgment by writ of certiorari is invoked under 28 U. S. C. §1254.

Questions Presented for Review

1. Is the failure of a "neutral" arbitrator to disclose prior employment by one of the parties, including services rendered on the very projects involved in the arbitration, sufficient ground to vacate an award, within the provisions of the Federal Arbitration Act?

2. Does the failure of such party to disclose such prior relationship constitute corruption and fraud in the procurement of the award, within the provisions of the Federal Arbitration Act?

3. Does such concealment of the prior relationship constitute misbehavior on the part of the arbitrator within the provisions of the Federal Arbitration Act?

Statute Involved

The Federal Arbitration Act, 9 U. S. C. §10 provides as follows:

"VACATION—GROUNDS REHEARING.

"In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

Other sections of the Act which may be pertinent to the consideration of the petition are set forth in Appendix "B" hereto.

Statement of the Case

Petitioner Commonwealth Coatings Corporation (hereinafter referred to as "Commonwealth"), was a subcontractor of respondent A. P. Samford Overseas Inc. (hereinafter referred to as "Samford"), for the performance of painting work on five projects in Puerto Rico on which Samford was the general contractor (R. 41a). The total amount of the subcontracts was $351,938.00 (R. 33a). The con-

tracts provided for progress payments to Commonwealth (R. 41a). Although Samford received payment from the owners in excess of the amount due to Commonwealth for work performed by it, Samford failed to make payment to Commonwealth in the sum of $113,566.05 (R. 42a-45a).

Commonwealth instituted suit against respondents, Continental Casualty Company and Fireman's Fund Insurance Company in the United States District Court for the District of Puerto Rico on Miller Act bonds given on one of the projects. (40 U. S. C. §§270(a) and 270(b); R. 2a, 12a; Civ. 441-62, 442-62.)

The contracts between Commonwealth and Samford contained the following provision for arbitration (R. 46a-47a):

> "Article XII: If any question of fact shall arise under this contract, either party hereto may demand an arbitration by reference to a Board of Arbitration, to consist of one person selected by Contractor, and one person selected by Sub-contractor, these two to select a third, and in case these two fail to select a third within three days, he shall be named by the Architect or his authorized representative. In case either Contractor or Sub-contractor fails to name an arbitrator within three days after requested to do so, the Architect, or his authorized representatives, shall name an arbitrator to represent the party so failing to name one. The written decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such reference. Arbitration of a demand or decision by the Architect or Owner shall be made within 5 days following notification to Sub-contractor of such demand

or decision, otherwise Sub-contractor shall be bound thereby, unless the Owner shall agree to arbitration after that period. Provided, nothing contained herein shall excuse Sub-contractor from completion of the work in the manner provided in this contract nor shall the pendency of any dispute or arbitration proceeding excuse any delay, deficiency, default or noncompliance therewith."

Pursuant to such provision an arbitration proceeding was instituted between Commonwealth and Samford on the five sub-contracts (R. 31a). Upon the institution of the Arbitration proceedings, the Sureties obtained orders in the United States District Court staying the actions against them pending the decision in the arbitration proceeding (R. 3a, 13a). (Civ. 441-62, [illegible]-62.)

The Arbitration before three arbitrators resulted in a unanimous award on November 12, 1963 in favor of Samford discharging it from all liability to Commonwealth for any part and all of the unpaid balances on the sub-contracts in the sum of $142,435.51, and awarding Samford $15,872.35, which was the amount by which it was decided the completion costs in the sum of $158,307.36 exceeded the unpaid balances (R. 34a).

Commonwealth then moved in the United States District Court to vacate the award on the ground, among others, that there was evident partiality in the arbitrators, that after the rendition of the award, Commonwealth learned that the third arbitrator and chairman of the Board of Arbitration had a prior association with Samford which had not been disclosed to Commonwealth, and that if Commonwealth had known of such prior association, it would

not have consented to his appointment as an impartial arbitrator (R. 15a, 21a, 36a, 54a, 55a-61a). (Civ. 65-64, Federal Arbitration Act; 9 U. S. Code §10.) Commonwealth's motion to vacate the award was consolidated with the actions against the sureties, and left in abeyance until a final decision on the merits (R. 75a).

Hearings were had in the District Court with respect to the prior association of the third arbitrator with Samford (R. 72a-174a). At the conclusion thereof, the District Court denied the motion, confirmed the award and directed judgment in favor of Samford and the sureties (R. 175a-177a). Judgment was entered in the District Court on September 30, 1966 (R. 178a). The Court of Appeals affirmed on September 27, 1967.

The Facts as to the Prior Business Relationship Between the Third Arbitrator and Samford and the Failure to Disclose the Same to Petitioner

In accordance with the arbitration procedure established in the subcontracts, Commonwealth designated as one arbitrator an attorney Holman (R. 136a). Samford designated arbitrator Chapman (R. 32a). These two arbitrators designated one Jose L. Capacete as the third arbitrator and chairman of the Board of Arbitration (R. 32a, 48a, 136a). Holman died 2 or 3 days after the first meeting of the arbitrators (R. 136a). Commonwealth's attorney requested Capacete to give him names of attorneys who would have something to do with engineering. Capacete gave a list of 5 to 7 lawyers. Among these was Munoz, an attorney. Commonwealth designated him to take the place of the deceased arbitrator (R. 136a).

At the time of the designation of the arbitrators and prior to the arbitration hearings, Commonwealth's attorney investigated the arbitrators to discover if any of them had any previous business or financial relationship with Samford or any of its affiliates or holding companies or with Amos Samford. He found none (R. 54a). None of the arbitrators informed him that any of them had any prior business or financial relations with Samford or any of his companies (R. 54a). He testified that as an attorney, if he had known of any such relationship he would have challenged the arbitrator's capacity (R. 54a). He also testified that if he had been told of Capacete's prior relationship with Samford, he did not think he would have objected because he knew Capacete but he would certainly have told his client and given them the opportunity to determine (R. 142a). As a result of the failure to disclose the relationship, such opportunity was never given (R. 142a). Subsequent to the rendition of the award Commonwealth learned that Capacete had been previously employed by Samford on the very projects involved in the arbitration (R. 48a, 59a).

Capacete testified on the hearing in the District Court. He admitted that he knew Samford, that he and his company had worked for Samford prior to the arbitration and that such work was on projects involved in the arbitration (R. 126a). Capacete's company received approximately $12,500 from Samford, of which about three or four thousand dollars was for work on projects involved in the arbitration (R. 120a, 131a). Capacete admitted that he was never advised by Samford or its attorneys that his prior relationship with Samford should be disclosed, that he had no reason to believe that the matter should be disclosed

and that it never was disclosed (R. 127a, 128a). The failure to disclose such relationship is not disputed.

At the very time that Samford and Capacete were concealing their prior business relationship from petitioner, counsel for the surety companies imposed as a condition for Commonwealth's designation of an arbitrator to replace a deceased arbitrator, that the prospective arbitrator should have had no business prior relationship with the parties (R. 79a, 82-83a). Counsel declared such a reservation "a very reasonable thing and quite understandable" (R. 83a).

At one time during the arbitration, Capacete was going to resign as arbitrator and wrote a letter to the parties to that effect. Counsel for the surety companies asked him to stay as chairman of the board, and Capacete consented to stay (R. 126a). When he was asked at the hearing whether counsel knew about his previous employment by Samford, he said, "I have to say I imagine so, because I really don't know what goes through Currie's mind" (R. 127a).

Certiorari Should Be Granted for the Following Reasons

I.

Important question of federal law involved.

In view of the increasing use of "tri-partite" arbitrations to resolve commercial controversies, the important question of federal law presented has not been, but should be, settled by this Court, as to whether the failure of a "neutral" arbitrator, or of a party by whom he has been previ-

ously employed, to disclose such previous employment, is sufficient to invalidate an award under the Federal Arbitration Act.

The Court of Appeals has held in the instant case that "it would have been far better if there had been disclosure here" but it "could" not say that the relationship was sufficiently close to establish "evident partiality within the statute as a matter of law".

The importance of complete neutrality in a "neutral" arbitrator even though the other two arbitrators designated by the parties may not be completely disinterested has been recognized by the Courts.

In *Stef Shipping Corporation* v. *Norris Grain Co.*, 209 F. Supp. 249 (S. D. N. Y. 1962), the Court noted that in a tripartite arbitration it was not expected that an arbitrator appointed by a party should be completely neutral, but that the same situation did not apply to a third arbitrator appointed by the two arbitrators designated by the parties. The Court, quoting from *Astoria Medical Group* v. *Health Insurance Plan*, 11 N. Y. 2d 127, 134, 227 N. Y. Supp. 2d 401, 182 N. E. 2d 85, said:

> "Arising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be "neutral", at least in the sense that the third arbitrator or judge is.

In *Cross Properties, Inc.* v. *Gimbel Brothers, Inc.*, 12 N. Y. 2d 806, Court of Appeals Judge (now Chief Judge) Fuld, in his dissenting opinion, said:

> "In view of the fact that an award made by arbitrators is well-nigh conclusive, the courts must be

> especially careful, when the impartiality or objectivity of an arbitrator, appointed as a neutral, is challenged, to make certain that there were no undisclosed disqualifying relationships between such arbitrator and a party which might have prevented him from rendering an unprejudiced or independent decision. This has been a long-drawn-out complicated and expensive proceeding, but I do not see how, if the integrity of the arbitral process is to be assured, we may uphold the determination made in this case."

In *Petition of Dover Steamship Company,* 143 F. Supp. 738, 741 (S. D. N. Y.), it was said:

> "Moreover, the designation by the parties themselves of arbitrators who may not be completely disinterested, accords with the generally accepted practice in arbitration proceedings of this type. In such case, it is quite frankly recognized that the 'neutral' arbitrator is one selected by the parties' arbitrators."

In *Milliken Woolens, Inc.* v. *Weber Knit Sportswear, Inc.,* 202 N. Y. S. 2d 431, 11 A. D. 2d 166, *aff'd* 9 N. Y. 2d 878, 175 N. E. 2d 826, cited by the Court of Appeals in the case at bar, the statute (Sec. 1462 of the New York Civil Practice Act) contained provisions identical to the Federal Arbitration Act, 9 U. S. C. Section 10(b), that an arbitration award may be vacated where there is evident partiality, or where the arbitrators are guilty of any misbehavior by which the rights of any party have been prejudiced. In that case, there was no attempt to prove evident or actual partiality.

The Court, setting aside an award where there was undisclosed prior relationship with the arbitrators, said:

"Since the waiver (of objections to partiality) is a matter of intention (Matter of City of Rochester, 208 N. Y. 188, 197, 101 N. E. 875, 877, 47 L. R. A., N. S., 151), the touchstone in these arbitration cases is the knowledge, actual or constructive, in the complaining party of the tainted relationship or interest of the arbitrator. Thus in Dukraft Manufacturing Co. v. Bear Mill Mfg. Co., 22 Misc. 2d 1057, 151 N. Y. S. 2d 318, McNally, J., set aside an award because no disclosure was made that business transactions between the arbitrator and one of the parties had increased considerably during the pendency of the arbitration proceeding. In Shirley Silk Co. v. American Silk Mills, 260 App. Div. 572, 23 N. Y. S. 2d 254, an award was vacated where the arbitrator designated by the respondent failed to reveal to appellant that, prior to the arbitration, the firm of which the arbitrator was president had received a substantial award (in another arbitration) from a board of arbitrators of which the president of respondent was a member. See also Knickerbocker Textile Corp. v. Sheila-Lynn, Inc., 172 Misc. 1015, 16 N. Y. S. 2d 435, affirmed 259 App. Div. 992, 20 N. Y. S. 2d 985."

The Court quoted from *In Matter of Friedman,* 215 App. Div. 130, at p. 136, 213 N. Y. Supp. 369, at p. 375 where it was said:

"During recent years arbitration has been more and more resorted to for the settlement of business controversies. It therefore becomes of the utmost importance that in statutory proceedings of this character, where the rights of parties are adjudicated, not by trained lawyers and judges, but by fellow-business-

men, every safeguard possible should be thrown about the proceeding to insure the utmost fairness and impartiality of those charged with the determination of the rights of the parties. Nothing should be permitted to throw suspicion even upon the entire impartiality of arbitrators. The finality of an award of arbitrators, as compared with the reviewable decision of a judge or a referee, makes this all the more important, and that the tribunal which is to pass upon the rights of the parties be not subject to the slightest suspicion as to its fairness."

In 5 American Jurisprudence 2d, on Arbitration and Award, p. 652, Section 181, on Partiality of Arbitrators, it is said:

"Partiality on the part of arbitrators is a well recognized ground for the setting aside of awards. It is not necessary, in order to warrant the intervention of equity, that the partiality be evidenced by an unjust award. It has been held sufficient that the relationship between the arbitrators and one of the parties is of such a nature as to give clear grounds for suspicion of their proceedings and render it unlikely that they constituted the fair and impartial tribunal to which the other party is entitled."

II.

Conflict of Court of Appeals decisions.

There is a conflict in the decisions of the Court of Appeals for the 1st Circuit in our case and of the Court of Appeals for the 2nd Circuit in *Ilios Shipping and Trading Corp.* v. *American Anthracite and Bituminous Coal Corp.*, 148 F. Supp. 698 aff'd 245 F. 2d 873, cited by the Court of Appeals in the instant case, with the decisions of the 3rd Circuit in *Rogers* v. *Schering Corp.*, 165 F. Supp. 295 (DCNJ 1959), aff'd 217 F. Supp. 266 (1959) and of the 9th Circuit in the *American Guaranty Co.* v. *Cauldwell*, 72 F. 2d 209 (1934), on the same matter.

The Court of Appeals in our case held that the prior business relationship was not sufficiently close to establish evident partiality although "it would have been far better if there had been disclosure." In *Ilios*, although the Court recognized the rule that an award may be vacated where there is evident partiality, it held that the mere fact that there is some business relationship between the arbitrator and one of the parties is not in and of itself sufficient to disqualify the arbitrator and it said "Something more than a vague and rather remote business relationship between the arbitrator and one of the parties to the arbitration is certainly needed if the losing party seeks to vacate the award on the ground of 'evident partiality' of any of the arbitrators." The Court of Appeals affirmed on the opinion of the District Court.

The third and ninth Circuit Courts of Appeals declared no such limitation on the rule as to disclosure of business relationship.

In *Rogers* the firm of one of the arbitrators had previously done business with one of the parties. Such arbitrator had disclosed this fact to the American Arbitration Association prior to his appointment in response to an inquiry concerning circumstances capable of suggesting bias or possible disqualification. However, this disclosure was not communicated by the Arbitration Association or the arbitrator involved to the other party.

The Court referred to the Federal Arbitration Act (9 U. S. C. §10) providing for vacating an award where "evident partiality" or corruption exists. The Court vacated the award, holding as follows (p. 301):

> "The failure of the Administrator (of the American Arbitration Association) to communicate to the parties information disclosed by a prospective arbitrator bearing upon circumstances likely to create a presumption of bias, and the consequent prevention of the party to proffer a timely objection based upon that information, is more than a loose procedural informality. It goes to the heart of a body designed to resolve controversy—its integrity. In this instance it fails to protect what might be termed 'due arbitration process'."

In *American Guaranty* it was held that a business relationship between an arbitrator and one of the parties is sufficient to set aside an award as "inherently partial, even though not corrupt or fraudulent" (p. 212).

The question which should be resolved by this Court is whether or not it is the duty of such an arbitrator and party to disclose *any* business relationship between them so that the adverse party may be informed with respect thereto *prior* to submission of disputes to such arbitrator.

It is to be noted that in the *Ilios* case one of the grounds for denying the motion to set aside the award was the knowledge by the adverse party of the prior relationship.

A party, such as the petitioner herein, should not be required to risk the failure of an inquiry to disclose business dealings between an arbitrator and an adverse party. The Court of Appeals in the instant case stated that in its opinion "there is a difficult line between what should, in good faith, be volunteered, and what may be left for inquiry." This Court should decide whether there is any exception or limitation to the rule as to full disclosure.

CONCLUSION

For the foregoing reasons the writ of certiorari, should be granted.

Respectfully submitted,

EMANUEL HARRIS
Attorney for Petitioner
30 Vesey Street
New York, N. Y. 10007
Telephone 212—267-5700

MAX E. GREENBERG
EMANUEL HARRIS
On the Petition and Brief

APPENDIX "A"

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6857

COMMONWEALTH COATINGS CORPORATION,

Plaintiff-Appellant,

—v.—

CONTINENTAL CASUALTY COMPANY, *et al.,*

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before:

ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Emanuel Harris, with whom *Carlos A. Romero Barcelo, Max E. Greenberg,* and *Segurola, Romero & Toledo* were on brief, for appellant.

Overton A. Currie, with whom *Federico Ramirez Ros, Edward H. Wasson, Jr., Ramirez, Segal & Latimer* and *Smith, Currie & Hancock* were on brief, for appellees.

September 27, 1967

PER CURIAM. This is an appeal by the losing party to an arbitration award in which he invokes the provisions of 9 U.S.C. § 10 (1964). The sole ground of the appeal is the failure of one Capacete, the impartial arbitrator selected by the other two, and of appellee Samford, the successful party, to disclose the past relationship between Capacete and Samford. Briefly, this relationship was as follows. Capacete was a majority owner of Foundation Engineering Company of Puerto Rico, a firm of very broad activities in the community and which, over a period of years, performed drilling operations for foundation investigations and conducted laboratory testing of construction materials for Samford. These services, performed by the firm under Capacete's general supervision, and to some extent requiring his direct intervention, were in several instances rendered with regard to the projects involved in the arbitration. Capacete also did some work for the architects on the projects. The payments received were a very small part of Capacete's income for the years involved, and none of the services related to matters in question in the arbitration, or was rendered during the proceedings. It is appellee's position that there was no duty to disclose, and that if appellant desired knowledge as to the existence of such past relationships it was incumbent upon him to inquire, citing *Ilios Shipping & Trading Corp.* v. *American Anthracite & Bituminous Coal Corp.*, D.C.N.Y., 1957, 148 F. Supp. 698, *aff'd*, 2 Cir., 245 F.2d 873.

In our opinion there is a difficult line between what should, in good faith, be volunteered, and what may be left for inquiry. We may agree with appellant that where there is a disturbingly close relationship the very failure to make disclosure could be evidence of partiality, and we think it would have been far better if there had been disclosure

here. However, we cannot say that the relationship was sufficiently close to establish "evident partiality" within the statute as a matter of law. *Cf. Milliken Woolens, Inc.* v. *Weber Knit Sportswear, Inc.*, 202 N.Y.S.2d 431, *aff'd*, 9 N.Y.2d 875, 175 N.E.2d 826. As to appellant's companion contention, the court was well warranted in finding that there was no prejudice or bias in fact manifested in the course of the proceedings. Indeed, there was considerable evidence which negatived it.

Affirmed.

APPENDIX "B"

Opinion of District Court

MEMORANDUM

[SAME TITLES]

These are actions under Sections 270(a) and 270(b) of Title 40 U.S.C.A. under a payment bond delivered to the United States by defendants in connection with a subcontract for a painting job.

By Order of this Court dated March 12, 1963, the actions were stayed pending the decision and award of a Board of Arbitration. The arbitrators rendered their unanimous Final Award and Determination on 12 November 1963. By the said award the principal contractor, A. C. Samford Overseas, Inc. was awarded the sum of $15,872.35 recoverable from plaintiff, Commonwealth Coatings Corporation. Plaintiff has challenged the Award, and seeks an order from the Court vacating it, on the following grounds:

1. Lack of power to grant the award because of the restraining order of the Referee in Bankruptcy of November 8, 1963, in The Foundation Company, et al., bankruptcy proceedings in the USDC, SDNY, Case No. 63B903.

2. A contention that reversible error was committed by the arbitrators in admitting certain exhibits of Samford and in not extending the arbitration hearings.

3. Alleged partiality, bias or fraud of the arbitrators.

4. Alleged failure of the arbitrators to render the award within 30 days of the close of the hearings.

5. A contention that the award was void because the arbitrators held hearings on Sundays and holidays.

Exception Nos. 1, and 4 above were dealt with at the hearing of February 14, 1966, and the Court indicated, (p. 16, Tr.) that it was not impressed by them. The opinion of the Court has not changed, and they are overruled.

With respect to No. 3, alleged partiality, bias or fraud of one of the arbitrators, counsel for plaintiff disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved. He seeks to overthrow the award on the ground that *Samford* should have informed plaintiff that the engineering firm with which the arbitrator involved[1] was connected had in the past done work for Samford. In view of the fact that, not only has plaintiff failed to offer any evidence showing "evident partiality" in said arbitrator (9 U.S.C. Sec. 10(b)), it also has expressly disclaimed any such imputation, this objection to the award must be, and is hereby overruled. See: *Ilios Shipping and Trading Corp., S.A., Petitioner, and American Anthracite & Bituminous Coal Corp., Respondent,* 148 F. Supp. 698, and cases cited therein.

In connection with the claim, objection 2 above, that the arbitrators erred in admitting certain exhibits, suffice it to say that Commonwealth Coatings Corp. made no objection to their admission by the arbitrators, nor was any request for an extension of time made.

Objection 5, the holding of hearings on Holidays and Sundays, is too frivolous to merit discussion, and is overruled.

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[1] Who had been selected by the two arbitrators designated by the parties.

In closing, I wish to state that the record shows that the arbitrators conducted fair, impartial hearings; that they reached a proper determination of the issues before them, and that plaintiff's objections represent a "situation where the losing party to an arbitration is now clutching at straws in an attempt to avoid the results of the arbitration to which it became a party." (*Ilios Shipping and Trading Corp., S.A., Petitioner, and American Anthracite & Bituminous Coal Corp., Respondent,* supra).

Plaintiff's motion to vacate the award of the Board of Arbitration is hereby Denied, the Award is confirmed, and Judgment will be entered in favor of defendants, for the amount determined by the arbitrators.

San Juan, Puerto Rico, September 30, 1966.

(signed) CLEMENTE RUIZ-NAZARIO
Clemente Ruiz-Nazaria
Chief United States District Judge

FILED & ENTERED
Sep 30 1966

CLERK, U.S. DISTRICT COURT
SAN JUAN, PUERTO RICO

APPENDIX "C"

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6857.

COMMONWEALTH COATINGS CORPORATION,

Plaintiff-Appellant,

—v.—

CONTINENTAL CASUALTY COMPANY *et al.*,

Defendants-Appellees.

JUDGMENT

September 27, 1967.

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

ROGER A. STINCHFIELD
Clerk.

By: /s/ DANA H. GALLUP
Chief Deputy Clerk.

APPENDIX "D"

Statute Involved

FEDERAL ARBITRATION ACT

Title 9 U. S. Code

§2. *Validity, irrevocability, and enforcement of agreements to arbitrate.*—A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§3. *Stay of proceedings where issue therein referable to arbitration.*—If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§9. *Award of arbitrators—Confirmation—Jurisdictional —Procedure.*—If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

FILED
JAN 22 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 14

COMMONWEALTH COATINGS CORPORATION,

Petitioner,

—v—

CONTINENTAL CASUALTY COMPANY, FIREMAN'S FUND INSURANCE COMPANY AND A. C. SAMFORD OVERSEAS, INC.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

LUTHER P. HOUSE, JR.
Attorney for Respondents
1405 Fulton National Bank Building
Atlanta, Georgia 30303
Telephone 404—521-3800

FEDERICO RAMIREZ ROS
208 First Federal Building
Stop 23, Ponce de Leon Avenue
Santurce, San Juan, Puerto Rico

OVERTON A. CURRIE
EDWARD H. WASSON, JR.
1405 Fulton National Bank Building
Atlanta, Georgia 30303

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QUESTION PRESENTED

1. Did the Court of Appeals commit reversible error in not holding, as proposed by Petitioner, that under the Federal Arbitration Act an arbitration award must be automatically vacated where there have been previous business relations between an arbitrator and a party, irrespective of any other considerations, such as:

   (a) The business relations were remote, isolated, casual and insubstantial, and occurred more than one year prior to the arbitration proceedings;

   (b) No inquiry was made of the party or the arbitrator about business relations although the objecting party (a subcontractor), whose counsel was a close personal friend of the arbitrator, knew the respective businesses of the arbitrator (performing engineering consulting services for the construction industry) and the party (a general contractor), knew these businesses were closely related (the firm with which the arbitrator was associated having performed engineering consulting services for most of the contractors in the area), knew of the prominent reputation of the arbitrator in his field, and knew of the substantial business engaged in by the party in the area;

   (c) The objecting party admitted that such business relations had no effect on the honesty or integrity of the arbitrator and that the arbitrator did not act improperly in any way, therefore admitting that such business relations had no effect on the arbitration proceedings or the award; and

   (d) The arbitration proceedings were in fact conducted in a fair and impartial manner?

STATEMENT OF THE CASE

One of the Respondents herein, A. C. Samford Overseas, Inc. (sometimes hereinafter referred to as "Samford") was the general contractor for the construction of five large projects in Puerto Rico, more particularly described as follows:

1. Aguadilla Housing Project in Aguadilla, Puerto Rico, under contract dated May 18, 1960, with the Puerto Rico Urban Renewal and Housing Corporation;

2. Dr. I. Gonzalez Martinez Oncologic Hospital under contract dated December 4, 1959, with the Board of Trustees of the Puerto Rican League Against Cancer;

3. The Central Power Plant & Laundry in Rio Piedras, Puerto Rico, under contract dated August 18, 1960, with the Provisional Board of the Puerto Rico Medical Center;

4. The Rehabilitation Center in Rio Piedras, Puerto Rico, under contract dated November 23, 1960, with the Provisional Board of the Puerto Rico Medical Center; and

5. The Wherry Housing Modification and Improvement at Ramey Air Force Base in Puerto Rico under contract dated November 23, 1960, with the United States of America (R.30a-31a, 41a).[1]

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[1]Citations to the Record by page number and suffix "a" are to pages of the Appendix of Appellant (Petitioner) filed with the Court of Appeals for the First Circuit and made a part of the Record before the Supreme Court under Rule 21 (3), Rules of the Supreme Court of the United States.

During 1960 and 1961 Petitioner, Commonwealth Coatings Corporation, and Samford entered into five subcontracts under which Petitioner was to perform the painting work on the five projects. The total of the subcontract prices was $351,938.00 (R.33a).

Petitioner commenced the painting work on the projects; however, disputes arose between the parties concerning performance of contractual obligations, Samford claiming that Petitioner failed to perform timely and correctly all of its duties under its subcontracts (R.31a, 72a). During June and July, 1962, Petitioner abandoned its work on the five projects and, pursuant to default provisions of the subcontracts, Samford terminated the subcontracts and completed the work of Petitioner, backcharging Petitioner for the cost of completion of the painting work (R.31a, 71a-72a).

Following termination of the subcontracts, arbitration proceedings were initiated by the parties pursuant to the arbitration clauses of the subcontracts as a means of resolving the disputes (R.31a, 69a-70a). Samford selected Dwight L. Chapman as its arbitrator (R.32a). Mr. Chapman was a graduate engineer with 30 years of service for the Corps of Engineers as a civilian engineer, acting principally in the capacity of contracting officer on government projects (R.95a-96a).

Petitioner selected as its arbitrator an attorney by the name of Holman (R.136a). Mr. Chapman and Mr. Holman named as the third arbitrator Jose L. Capacete, an eminent professional consulting engineer in Puerto Rico and a professor of engineering at the University of Puerto Rico and part owner and an officer of Foundation Engineering Company of Puerto Rico and the architectural-engineering firm, Capacete, Martin & Gutierrez

(R.66a, 132a, 133a, 136a, 37[2]). Mr. Holman shortly thereafter died, and Petitioner subsequently appointed Hector Martinez Munoz, a San Juan attorney, as its arbitrator (R.136a-137a). As a fellow San Juan attorney Mr. Martinez was a professional colleague and friend of the attorney for Petitioner, Carlos Romero Barcelo (R.66a).

However, before the arbitration hearings were commenced, Petitioner brought Civil Actions Nos. 441-62 and 442-62 in the District Court of Puerto Rico against Respondents, Continental Casualty Company and Fireman's Fund Insurance Company, the construction sureties of Samford on the various projects (R.2a, 12a). Civil Action No. 441-62 was brought separately as a Miller Act suit under 40 U.S.C.A. §270(b). Upon motions by the defendants in said actions, the actions were stayed by the District Court on March 12, 1963, pending the outcome of the arbitration proceedings (R.3a, 13a).[3]

Upon the issuance of the District Court of Puerto Rico of a stay of these actions, the arbitration commenced on August 14, 1963 (R.3a, 13a, 63a). At the opening of the arbitration proceedings, the parties mutually agreed that all questions of fact and law regarding the disputes between the parties would be submitted to the arbitrators for decision (R.32a-33a). After approximately ten days of hearings and an estimated 90 hours of testimony

[2]Citations to the Record by page number without suffix are to pages of the Appendix of Appellees, found beginning at page 36 of Brief of Appellees to the Court of Appeals for the First Circuit, and made a part of the Record before the Supreme Court under Rule 21 (3), Rules of the Supreme Court of the United States.

[3]Decision reported, *U.S. for Use and Benefit of Commonwealth Coatings Corp. v. Continental Cas. Co.* 214 F.Supp. 949 (D.C.P.R. 1963).

(R.83a), the hearings were concluded on September 3, 1963 (R.63a), and on November 12, 1963, the arbitrators issued their unanimous, formal, written award (R.30a-35a). The award determined that Petitioner had abandoned its work on the five projects without contractual right and, pursuant to the authority granted by the subcontracts, Samford properly terminated Petitioner as a subcontractor and completed its work (R.34a). Samford had claimed costs of completion of Petitioner's work in the amount of $244,025.00 (R.72a). Of the amount claimed, the arbitrators determined that the reasonable cost to Samford for completing this work was $158,307.86 (R.34a). By applying this backcharge against the total unpaid subcontract balance of $142,435.51 as provided in the default provisions of the subcontracts, the Board determined that Petitioner was indebted to Samford in the amount of $15,872.35, discharging Samford from any and all liability to Petitioner (R.34a).

On January 24, 1964, defendants in Actions Nos. 441-62 and 442-62 filed motions to dismiss the complaints in said actions on the basis of the issuance of the arbitration award in favor of their principal obligor, Samford (R.4a, 14a).

On February 7, 1964, Petitioner filed Civil Action No. 65-64 in the District Court of Puerto Rico against A. C. Samford Overseas, Inc. to vacate the arbitration award (R.21a, 36a-53a). Defensive pleadings were filed by Samford, praying for confirmation of the award and entry of judgment for Samford.

A hearing of the motions pending in Civil Actions Nos. 441-62, 442-62 and 65-64 was had in the United States District Court for Puerto Rico on July 16, 1965 (R.5a, 6a, 16a). On January 4, 1966, the District Court

formally consolidated Civil Actions Nos. 441-62, 442-62 and 65-64 for trial and all proceedings thereafter (R.74a-76a).

The three cases were called for trial on February 14, 1966, and testimony and argument of counsel were presented by Petitioner and Respondents (R.17a-18a, 77a-174a). On September 30, 1966, the District Court issued its memorandum decision and judgment confirming the award, determining that the hearings were fair and impartial, and ordering that Samford recover the amount of the award, $15,872.35, from Petitioner, with costs (R.175a-178a).

Petitioner appealed the decision of the District Court to the Court of Appeals for the First Circuit on the sole ground that there was "evident partiality" on the part of one arbitrator, Mr. Jose L. Capacete. Brief of the Appellant (Petitioner) to the Court of Appeals, p. 3-4. On September 11, 1967, oral argument was had, and on September 27, 1967, the Court of Appeals issued its per curiam decision affirming the judgment of the District Court of Puerto Rico. Pet. for Cert., Appendix "A," p. 17-19.[4]

On December 21, 1967, the Petition for Certiorari to the Court of Appeals for the First Circuit was docketed in the Supreme Court of the United States.

Petitioner's argument to the Court of Appeals and in the Petition for Certiorari is basically that there was automatically "evident partiality" under the Federal Arbitration Act, 9 U.S.C.A. §10(b), on the part of Mr. Capacete for the reason that information that engineering consulting services had been performed in the past by a

[4]Decision reported at 382 F.2d 1010.

firm with which Mr. Capacete was associated, Foundation Engineering Company of Puerto Rico, for Samford had not been volunteered to Petitioner, although such information was not solicited by Petitioner and regardless of other considerations such as the fact such transactions were insignificant and remote and the fact that Petitioner had indeed received a fair and impartial hearing.

Mr. Capacete testified that he owned 67% of Foundation Engineering Company of Puerto Rico (R.132a). Prior to the dispute between the parties and the arbitration proceedings, Foundation Engineering Company had performed engineering consulting services on isolated occasions for Samford (R.130a). Foundation Engineering Company prior to 1957 was the only engineering consulting firm in Puerto Rico performing such consulting services. Between 1957 and 1959 there were only two such companies in Puerto Rico and up to 1959 and 1960 Foundation Engineering Company was the larger of the two companies. After 1959, there were three firms performing such engineering consulting services in Puerto Rico, one other of which performed approximately the same amount of business as Foundation Engineering Company (R.132a-133a). As an engineering consultant Mr. Capacete further testified, "I would say I have business relations with most of the contractors in Puerto Rico" (R.133a).

The consulting services performed by Foundation Engineering Company for Samford were furnished between approximately 1957 and 1961 "or perhaps 1962" (R.130a). During the years involved the total annual volume of business of Foundation Engineering Company was in the order of $200,000 per year (R.132a). The total amount of business of Foundation Engineering Com-

pany with Samford over the four or five year period such consulting services were furnished was only a small portion of the business of Foundation Engineering Company, totalling for all four or five years only about $12,000 (R.130a). Of this, only a minor amount involved the five projects where Petitioner was a subcontractor, and *none of these services pertained in any way to Petitioner or the painting work* (R.130a). Mr. Capacete testified that some testing work was performed on two or three of these projects for charges totalling "in the order of three or four thousand dollars, maybe two or three thousand dollars" (R.131a). This testing work was performed over a period of approximately two years (R.131a). The type of services furnished by Foundation Engineering Company consisted of testing of concrete and other material and drilling for foundation investigations (R.59a, 127a). The fees paid Foundation Engineering Company were the normal and customary fees for such services (R.65a). Of the services performed for Samford by Foundation Engineering Company, only approximately 10% required Mr. Capacete's personal attention (132a). Foundation Engineering Company was only a part of Mr. Capacete's business interests, as he was also a part owner and officer in Capacete, Martin & Gutierrez, an architectural-engineering firm (R.133a).

The relationship between Mr. Capacete and Petitioner, through its counsel, Mr. Romero, was in fact much closer than any relationship with Samford. Mr. Capacete testified that he had met A. C. Samford, Jr. personally only "about 4 or 5 times" (R.126a). On the other hand, Mr. Capacete testified that at the time of the arbitration hearings he knew Mr. Romero "very well";

that he was "a very old friend of his father," who was one of the "highest esteemed engineers in this island"; and that Mr. Romero and he were fellow members of the Rotary Club (R.137a). He summarized his relationship with Mr. Romero as, "I know him well, I would say, as a good friend of mine" (R.137a).

Furthermore, Mr. Romero knew that Mr. Capacete was engaged in a business which would very likely have performed services for Samford. Mr. Capacete testified that Mr. Romero knew of his position in the field of engineering and his business activities, and that, "he was acquainted that he knew my type of business, that I was a consulting engineer in foundations and in testing" (R.137a).

Although this close relationship existed between Mr. Romero and Mr. Capacete, Petitioner argues that, "None of the arbitrators informed him [Mr. Romero] that any of them had any prior business or financial relations" with Samford. Pet. for Cert., p. 7. Mr. Capacete testified Mr. Romero *never asked him* whether he had performed work for or had had commercial relations with any of the parties to the arbitration (R.137a). Furthermore, no contention is advanced by Petitioner that any inquiry was ever made prior to conducting the arbitration proceedings of any of the Respondents or their counsel concerning previous business relations between any of the Respondents and any of the arbitrators.

Petitioner argues that Mr. Capacete and Respondents "concealed" the previous business relation between Foundation Engineering Company and Samford. Pet. for Cert., p. 2,8. "Concealment" implies a positive effort to avoid disclosure, but nowhere is there any evidence to

substantiate or give any credence to this allegation of fact by Petitioner.

Petitioner further argues that when Petitioner was to select a new arbitrator upon the death of its first arbitrator, Mr. Holman, "Counsel for the surety companies imposed as a condition for Commonwealth's designation of an arbitrator to replace a deceased arbitrator, that the prospective arbitrator should have had no business prior relationship with the parties." Pet. for Cert., p. 8. Here also there is no evidence to support the allegation of Petitioner. The citation of Petitioner to page 72a of the Record is merely to the *argument* of counsel for Petitioner. The citation to pages 82a-83a of the Record is to the reply to this argument by counsel for Samford in the arbitration proceedings, which reply entirely clarified the matter. Samford had merely reserved "the right to object [to a prospective arbitrator] because they have *an interest in the litigation or are involved in it*" (R.83a; emphasis added). No mention whatsoever was made of a categorical condition as to previous business relationships; Samford only desired to reserve its right to object if the new arbitrator were found to have an interest in the controversy itself.

REPLY OF RESPONDENTS TO PETITIONER'S ARGUMENT FOR THE GRANTING OF CERTIORARI

Petitioner, Commonwealth Coatings, is attempting to obtain a writ of certiorari on two grounds, namely: (1) that the Court of Appeals for the First Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, and (2) that the Court of Appeals has rendered a decision in con-

flict with the decision of another Court of Appeals on the same matter.

It is respectfully submitted by Respondents that there is no important question of federal law involved in the case at bar which requires resolution by the Supreme Court, and, to some extent reflecting the absence of an important federal question, there is no conflict between the decisions of the Courts of Appeals on the matter involved.

I. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT

The question which Petitioner submits should be resolved by this Court is whether or not under the Federal Arbitration Act there shall be an automatic vacatur of an arbitration award where a party or an arbitrator prior to the commencement of arbitration proceedings, has not volunteered unsolicited information about business relationships that may have existed between them, regardless of how remote and insignificant, and notwithstanding whether or not there was any effect on the hearings or the award. Pet. for Cert., p. 14.

Nowhere in either the case authority or legal commentaries has there been found any indication that this is a question under the Federal Arbitration Act which requires resolution by the Supreme Court. To the contrary, the general rule is well settled concerning the test of what factors will warrant the vacatur of an award, which rule has been consistently applied by the federal courts, including the District Court and the Court of Appeals in the case at bar. American Jurisprudence 2d states the rule:

"Though the courts look with favor on arbitration proceedings and make every presumption in favor of the validity of awards, this is done on the assumption that these awards constitute the *honest judgment* of the arbitrators, rendered after a *fair hearing*. Consequently, when there is *positive evidence of fraud or collusion* on the part of the arbitrators, they lose all claim to the favor of the courts and, under equitable principles, the awards will will (sic) be set aside. Where there has been fraud, the arbitrators have not really acted within the lines of the duty laid upon them; they have not in fact carried out the agreement under which they obtained authority to act. *Corrupt motives, however, are not lightly to be ascribed to the arbitrators.*" 5 Am.Jur.2d 647. (Emphasis added.)

"An interest or bias to disqualify may be small, but *it must be direct, definite, and capable of demonstration, not remote, uncertain, or speculative.* A person may be disqualified if he is a close relative, servant, employee, or agent of one of the parties, or has any secret interest in the result or decision of the dispute. *And where the relationship is not sufficient per se to warrant equitable interference, it will be considered in the light of all the other circumstances of the case, such as the conduct of the arbitrators, or the size of the award. If, when taken as a whole, partiality is evident, the award will be set aside. But courts will not interfere under their equity powers where the relationship of the parties is casual or such as not to give rise to an inference of unfairness.*" *Id.* at 653. (Emphasis added.)

To summarize this rule in light of the position taken

by Petitioner, it is clear that something more than the mere existence of a past business relationship between an arbitrator and a party to arbitration proceedings, not known to the other party in the proceedings, is required before an award will be vacated. In other words, when an award is challenged on the ground of partiality of an arbitrator, a court weighs the evidence presented to determine if it supports the conclusion of either certain or probable partiality, bias or fraud as a matter bearing directly upon whether the objecting party received a fair hearing; the court seeks to determine whether there was *actual* partiality, bias or fraud, not merely whether some mere circumstance, such as previous business relationship, exists which may or may not indicate anything about the fairness of an arbitration hearing, depending on the particular facts of each case. *Saxis Steamship Co. v. Multifacs International Traders, Inc.*, 375 F.2d 577 (2nd Cir. 1967); *Ilios Shipping and Trading Corp v. American Anthracite & Bituminous Coal Corp.*, 148 F.Supp. 698, (D.C.N.Y. 1957), aff'd 245 F.2d 873 (2nd Cir. 1957); *Kentucky River Mills v. Jackson*, 206 F.2d 111, 47 ALR2d 1331 (6th Cir. 1953), cert. den. 346 U.S. 887, 74 S.Ct. 144, 98 L.ed. 392 (1953); *Fireman's Fund Ins. Co. v. Flint Hosiery Mills*, 74 F.2d 533, 104 ALR 556 (4th Cir. 1935), cert. den. 295 U.S. 748, 55 S.Ct. 826, 79 L.ed. 1692 (1935); *The Hartbridge*, 62 F.2d 72 (2nd Cir. 1932), cert. den. 288 U.S. 601, 53 S.Ct. 320, 77 L.ed. 977 (1933); *Stef Shipping Corporation v. Norris Grain Co.*, 209 F.Supp. 249 (D.C.S.D.N.Y. 1962); *Texas Eastern Transmission Corporation v. Barnard*, 177 F.Supp. 123 (D.C.Ky. 1959), rev'd on other grounds, 285 F.2d 536 (6th Cir. 1960); *Cross Properties, Inc. v. Gimbel Brothers, Inc.*, 225 N.Y.S.2d 1014 (App. Div. 1962), aff'd 12 N.Y.2d 806 (Ct. App.), *E. Richard*

Meinig v. Katakura and Co., 272 N.Y.S. 735 (App. Div. 1934), 266 N.Y. 418, 195 N.E. 134.

The Second Circuit had occasion recently in *Saxis Steamship Co., supra,* to review the procedure followed by the courts when evaluating objections to an award under the Federal Arbitration Act, with particular attention to the objection of "evident partiality,"

> "'. . . the role of the courts is limited to ascertaining whether there exists one of the specific grounds for the vacation of an award, provided in §10 of the Arbitration Act, ... *It is true that when a claim of partiality is made, the court is under an obligation to scan the record to see if it demonstrates 'evident partiality' on the part of the arbitrators.* [Authority cited.] *The burden of proof on this issue in the confirmation proceedings in the district court rests upon the party making the claim." Id.* at 581-582.

The Court of Appeals below indicated it followed the general rule where the court stated, reflecting a review of the relationship between Mr. Capacete and Samford,

> ". . . we cannot say that the relationship was sufficiently close to establish 'evident partiality' within the statute as a matter of law. [Authority cited.]" Pet. for Cert. Appendix "A," p. 19.

The Court of Appeals evaluated the evidence as to the relationship between Foundation Engineering Company and Samford and determined that the relationship was not sufficiently close to establish "evident partiality" on the part of Mr. Capacete.

Petitioner has generally conceded that there was no *actual* bias, partiality or fraud on the part of Mr. Capa-

cete or that the award was affected adversely because of the previous business relations between Foundation Engineering Company and Samford: Petitioner has on numerous occasions admitted that it does not challenge the honesty or integrity of Mr. Capacete or allege that Mr. Capacete acted improperly in any way.[5]

At the hearing before the District Court on July 16, 1965, on the motions of Petitioner to set aside the arbitration award, Mr. Romero, attorney for Petitioner, stated,

> "Now, we don't mean to say that we believe that the Chairman [Mr. Capacete] acted improperly in any way. . . " (R.37).

The District Court summarized the position of Petitioner by stating,

> "I know Mr. Capacete pretty well and I know his caliber as an engineer and as a man of science, there is no doubt. And I believe that nobody here is trying to raise any reflection whatsoever on the ability, honesty and integrity of Mr. Capacete. . . " (R.37),

to which Mr. Romero for Petitioner responded,

> "That's our position and we have so stated numerous times" (R.37).

At the second hearing before the District Court on February 14, 1966, on the motions of Petitioner to set aside the award, Mr. Romero for Petitioner admitted that Petitioner was making no challenge of the integrity of Mr. Capacete and, in fact, the court was assured of Mr. Capacete's honor,

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[5]When confronted with these admissions, Petitioner has, however, vacillated in its position. Reply Brief of Appellant (Petitioner) to the Court of Appeals, p. 3.

"We want to make it known that we are in no way attacking the arbitrator's integrity. We believe him to be an honorable man," (R.79a),

to which the District Court responded,

"I believe you have said that all the time that you have come in here" (R.79a).

On the basis of these admissions and upon consideration of all the evidence presented at the hearings and the arguments of the parties, the District Court specifically held,

"With respect to No. 3, alleged partiality, bias or fraud of one of the arbitrators, *counsel for plaintiff disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved.* He seeks to overthrow the award on the ground that Samford should have informed plaintiff that the engineering firm with which the arbitrator involved was connected had in the past done work for Samford. In view of the fact that, not only has plaintiff failed to offer any evidence showing 'evident partiality' in said arbitrator [9 U.S.C. §10 (b)], *it also has expressly disclaimed any such imputation,* this objection to the award must be, and is hereby overruled. [Authorities cited]" (R.176a). Pet. for Cert., Appendix "B," p. 21. (Emphasis added.)

Both the trial court and the Court of Appeals reviewed the arbitration proceedings and determined that the evidence showed the proceedings were in fact fairly and impartially conducted. The District Court held,

"In closing, *I wish to state that the record shows that the arbitrators conducted fair, impartial hearings;*

that they reached a proper determination of the issues before them . . . " (R.176a-177a). Pet. for Cert., Appendix "B," p. 22. (Emphasis added.)

The Court of Appeals held,

"As to appellant's companion contention, *the court was well warranted in finding that there was no prejudice or bias in fact manifested in the course of the proceedings. Indeed, there was considerable evidence which negatived it.*" Pet. for Cert., Appendix "A," p. 19. (Emphasis added.)

Petitioner cites and quotes from several state and federal court decisions apparently to support its argument that an important question of federal law is involved and that the rule proposed by Petitioner is substantiated by case authority. Pet. for Cert., p. 9-12. It is respectfully submitted that the cases and the quotations from the cases entirely fail to indicate that there is an important question of federal law in the case at bar which should be resolved by this Court; furthermore, the cases and quotations noted by Petitioner are not necessarily inconsistent with and in fact tend to support the position of Respondent to the effect that the courts follow the procedure of weighing the evidence to determine whether the objecting party to an arbitration award has received an actually fair and impartial hearing, and, if previous business relationships are charged, whether those relationships are so close as to cause the fairness of the hearings to be suspect. See, e.g. *Stef Shipping, supra,* cited by Petitioner at p. 9, Pet. for Cert.

The *Ilios Shipping* decision, *supra,* relied on by the District Court and the Court of Appeals contains perhaps the best statement of the repudiation of the proposition made by Petitioner that a finding of business rela-

tionship between an arbitrator and a party inherently necessitates setting aside the award. The court held,

> "Something more than a vague and rather remote business relationship between the arbitrator and one of the parties to the arbitration is certainly needed if the losing party seeks to vacate the award on the ground of 'evident partiality' of one of the arbitrators. *It is well established that the mere fact that there is some business relationship between the arbitrator and one of the parties to the arbitration is not in and of itself sufficient to disqualify the arbitrator.* [*Citing E. Richard Meinig Co., supra.*]" 148 F.Supp. 698, 700. (Emphasis added.)

Petitioner attempts to distinguish *Ilios Shipping* from the case at bar by saying that, " . . . one of the grounds for denying the motion to set aside the award was *the knowledge by the adverse party of the prior relationship.*" Pet. for Cert., p. 15. Contrary to this statement of the case, the objecting party had no knowledge of the business relationship between the other party and the arbitrator, but only had knowledge of the fact the arbitrator was in a particular business (*Ilios Shipping*, 148 F.Supp. 698, 700), the same knowledge Petitioner had in the case at bar (R.137a). Knowing such business, and the likelihood that there could have been transactions between the arbitrator and the other party in the normal course of such business, the objecting party was held bound by what he could have learned upon inquiring of the persons involved; likewise, in the case at bar Petitioner, having had knowledge of the occupation and professional reputation of Mr. Capacete, cannot now be heard to complain of what it could easily have discovered prior to arbitration.

II. THERE IS NO CONFLICT BETWEEN THE DECISIONS OF THE COURTS OF APPEALS

Petitioner claims there is a conflict between the decisions of the Courts of Appeals which should be resolved by the Supreme Court. Petitioner argues that the decision of the Second Circuit in *Ilios Shipping, supra,* and the decision of the First Circuit in the case at bar conflict with the decisions of the Third Circuit in *Rogers v. Schering Corporation,* 165 F.Supp. 295 (D.C.N.J. 1958), aff'd 271 F.2d 266 (1959), and of the Ninth Circuit in *American Guaranty Co. v. Caldwell,* 72 F.2d 209 (1934).

Petitioner apparently contends that the *Rogers* and *American Guaranty* cases hold that where a claim of partiality is made based on business relationship of an arbitrator with one of the parties and this relationship has not been disclosed, the award is automatically set aside on the ground of "evident partiality" without any other consideration entering into this determination. In short, Petitioner argues that these cases establish an absolute rule requiring disclosure of business relationships, however remote and insignificant they may be, which, if not complied with by a party, will result in an automatic vacatur of an arbitration award under the Federal Arbitration Act. These cases simply do not support this proposition.

The *Rogers* case concerned an arbitration clause in a written contract which specifically required that the parties submit disputes to arbitration pursuant to the rules of the American Arbitration Association and to select arbitrators from panels furnished by the American Arbitration Association. The court, after elaborate discussion of the Arbitration Association's rules, held that Section 18 of the Arbitration Association's rules re-

quired disclosure to the parties of "any circumstances likely to create a presumption of bias or which he [the arbitrator] believes might disqualify him as an impartial arbitrator." 165 F.Supp. 295, 298. Since, in violation of Section 18, information of this sort had not been forwarded the objecting party by the Arbitration Association which had received such information from the arbitrator, the court vacated the award.

The turning point of the case in *Rogers* was that the parties had *contracted* for disclosure to be made by the parties by incorporating the American Arbitration Association rules. The failure of the Arbitration Association to comply with its own rules resulted in what the court termed a failure of "due arbitration process." 165 F.Supp. 205, 301. *Rogers* is, therefore, in the class of those decisions where courts have set aside awards because an arbitrator has been appointed in a manner not in full compliance with the procedure specifically required by the arbitration clause of the contractual agreement, and is not a case which holds that, absent contractual agreement to disclose such information, there is an absolute duty under the Federal Arbitration Act to volunteer unsolicited information about previous business relations, however insignificant and remote, under penalty of vacatur of the award.

In the case at bar there was no such contractual agreement between the parties to follow the rules of the American Arbitration Association or to incorporate by contract any other requirement for the volunteering of unsolicited information by arbitrators or parties. Accordingly, since there was no agreement between the parties to deviate from the general rules obtaining for the selection of arbitrators and the conduct of proceedings, the

general rule that the mere fact that prior business relations existed is not sufficient alone to vacate the award remains controlling of the case; if such information is desired by a party to arbitration proceedings, the duty is simply to inquire of the arbitrator or the other party whether such business relations have existed.

The *American Guaranty* case, *supra*, briefly referred to by Petitioner similarly fails to support the proposition made by Petitioner. The objecting party challenged the arbitration award in the trial court on *two* grounds, that one of the arbitrators was "irregularly appointed" and that the same arbitrator had a "business connection" with the other party. *Id.* at 211. The trial court, after reviewing the evidence presented, had held that the arbitrator was "improperly appointed" and "that his actions as umpire were partial to appellant." *Ibid.* The Court of Appeals held,

> "The holding of the District Court that the appointment of R. E. Laley as arbitrator was irregular and illegal and that the award of said arbitrator was evidently partial, but not corrupt or fraudulent, was fully justified. The method of appointment as provided in the agreement was not followed, and the arbitrator appointed had a business relationship with one of the parties. These facts, *taken together*, warranted the setting aside of an award made by such an arbitrator as inherently partial, even though not corrupt or fraudulent. [Authorities cited.]" *Id.* at 212. (Emphasis added.)

It is clear that this holding rests on *two* grounds, namely, that the appointment was irregular, i.e., not in accordance with the procedure prescribed by the contract between the parties, and secondly, that the arbitra-

tor was "evidently partial." It appears from the description of the trial court's decision, "that his [the arbitrator's] actions as umpire were partial to appellant," that there was evident partiality in the "actions" of this arbitrator, but that the Court of Appeals could not go so far as to say that this actual partiality amounted to "corrupt or fraudulent" conduct, more extreme degrees of misconduct. It is self-evident that the Ninth Circuit of Appeals did not say, much less hold, that an undisclosed prior business relationship, regardless of the circumstances, was sufficient alone to set aside the award automatically.

A discussion of these cases indeed shows that the courts are in agreement that their function in reviewing arbitration awards is to study the merits of the objections made and determine whether under the Federal Arbitration Act the objecting party was denied any rights, including such rights as the right to compliance with the contract arbitration procedure and the right to a fair and impartial hearing. In the case at bar there has been no contention that the arbitration procedure specified by the contract has not been followed and, as noted above, it has generally been conceded by Petitioner that the hearings were fair and impartial; additionally, as discussed above (*infra* at p. 16-17), both the trial court and the Court of Appeals found specifically that the hearings were fair and impartial.

To follow the rule proposed by Petitioner would completely frustrate and perhaps forever destroy the principal values of arbitration proceedings. The advantages of arbitration as compared with litigation are the relative speed and inexpensiveness with which disputes between parties can be settled by arbitration; experts in the field in which the dispute arises are frequently used

rather than attorneys or professional arbitrators; the proceedings are often conducted by the parties themselves without employment of attorneys. Note, Judicial Review of Arbitration Awards on the Merits, 63 Harv.L. Rev. 681 (1950). To impose legalistic, technical and unnecessary procedural pitfalls on this means of contractual settlement of disputes would open many additional doors to the challenge of arbitration awards and eliminate the confidence of the parties in the finality of awards. In turn, of course, such requirements would promote litigation over technical matters by losing parties attempting in any way possible to set aside awards. Clearly, this result violates the policy adopted by Congress in the Federal Arbitration Act supporting resolution of disputes by arbitration.

The Supreme Court has had occasion to comment on the Federal Arbitration Act and its purposes in *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.ed. 168 (1953),

> "The United States Arbitration Act establishes by statute the desirability of arbitration as an alternative to the complications of litigation. The reports of both Houses on that Act stress the need for avoiding the delay and expense of litigation [authorities cited], and practice under its terms raises hope for its usefulness both in controversies based on statutes [authorities cited] or on standards otherwise created [authorities cited]." 364 U.S. 427, 431-432, 98 L.ed. 168, 173-174.

The Court goes on to point out that arbitration is less formal than judicial proceedings and that, "Power to vacate an award is limited [citing 9 U.S.C.A. § 10]" (346 U.S. 427, 435-438, 98 L.ed. 168, 176-177); these, of course, are characteristics of arbitration which are neces-

sitated in order to achieve less delay and expense than are found in judicial proceedings.

It is noteworthy to observe that the history of the case at bar which began in early 1963 reflects the time-consuming efforts of the parties, their counsel and the attendant expenses incurred attempting to obtain a final resolution of disputes between the parties which should have been concluded by the award rendered in the fall of 1963. As the District Court observed,

> ". . . plaintiff's [Petitioner's] objections represent a 'situation where the losing party to an arbitration is now clutching at straws in an attempt to avoid the results of the arbitration to which it became a party.' [Quoting from *Ilios Shipping, supra,* 148 F.Supp. 698, 700]" (R.176a-177a). Pet. for Cert., Appendix "B," p. 22.

CONCLUSION

Respondents respectfully submit that Petitioner has not met the test for the granting of a writ of certiorari in that there are manifestly no "special and important reasons" present for the granting of certiorari. Rule 19, Rules of the Supreme Court of the United States. As the Supreme Court stated in *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 43 S.Ct. 422, 67 L.ed. 712 (1923),

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority be-

tween the circuit courts of appeal." 261 U.S. 387, 393, 67 L.ed. 712, 714.

Petitioner has failed to show any reason warranting the granting of certiorari and, moreover, the relevant authorities reflect that the issue raised in the case at bar by Petitioner is being adequately and uniformly resolved by the Courts of Appeals, including the Court of Appeals for the First Circuit in the case at bar. Accordingly, the Petition fo Certiorari should be denied.

Respectfully submitted this 19th day of January, 1968.

LUTHER P. HOUSE, JR.
Attorney for Respondents
1405 Fulton National Bank Building
Atlanta, Georgia 30303
Telephone 404—521-3800

FEDERICO RAMIREZ ROS
208 First Federal Building
Stop 23, Ponce de Leon Avenue
Santurce, San Juan, Puerto Rico

OVERTON A. CURRIE
EDWARD H. WASSON, JR.
1405 Fulton National Bank Building
Atlanta, Georgia 30303

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OCTOBER TERM, 1967

No. [redacted] 14

COMMONWEALTH COATINGS CORPORATION,

Petitioner,

—v.—

CONTINENTAL CASUALTY COMPANY, FIREMAN'S FUND INSURANCE COMPANY and A. C. SAMFORD OVERSEAS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

EMANUEL HARRIS
Attorney for Petitioner
30 Vesey Street
New York, N. Y. 10007
Telephone (212) 267-5700

EMANUEL HARRIS
MAX E. GREENBERG
SAYWARD MAZUR
On the Brief

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 937

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 382 F. 2d 1010. The opinion of the United States District Court for the District of Puerto Rico is unreported.

Jurisdiction of the Court

Jurisdiction to review the judgment herein by writ of certiorari is invoked under 28 U. S. C. Section 1254. The judgment of the Court of Appeals was entered on September 27, 1967 (A. 195). The petition for certiorari was filed herein on December 21, 1967, and was granted on March 11, 1968.

Statute Involved

The Federal Arbitration Act, 9 U. S. C. §10 provides as follows:

"VACATION—GROUNDS REHEARING.

"In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and

definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

Other sections of the Act which may be pertinent to the consideration of the petition are set forth in Appendix "A" hereto.

Questions Presented for Review

1. In a tripartite arbitration, does the failure of a third or "neutral" arbitrator, to disclose his prior employment by one of the parties, on the projects involved in the arbitration, as well as on other projects, constitute evident partiality, corruption, fraud or misbehavior and, therefore, render the award in favor of such party invalid under the provisions of the Federal Arbitration Act?

2. Does the failure of the party by whom said arbitrator was employed to disclose such prior employment constitute procurement of the arbitration award by corruption or fraud and, therefore, render the award in favor of such party invalid under the provisions of the Federal Arbitration Act?

Statement of the Case

Petitioner Commonwealth Coatings Corporation (hereinafter referred to as "Commonwealth"), was a subcontractor of respondent A. P. Samford Overseas Inc. (hereinafter referred to as "Samford"), for the performance of painting work on five projects in Puerto Rico on which Samford was the general contractor (A. 41). The total amount of the subcontracts was $351,938.00 (A. 33). The subcontracts provided for progress payments to Commonwealth (A. 41). Although Samford received payment from the owners in excess of the amount due to Commonwealth for work performed by it, Samford failed to make payment to Commonwealth in the sum of $113,566.05 (A. 42-45).

Commonwealth instituted suit against respondents, Continental Casualty Company and Fireman's Fund Insurance Company in the United States District Court for the District of Puerto Rico on Miller Act bonds given on one of the projects. (40 U. S. C. §§270(a) and 270(b); A. 2, 12; Civ. 441-62, 442-62.)

The contracts between Commonwealth and Samford contained the following provision for arbitration (A. 46-47):

> "Article XII: If any question of fact shall arise under this contract, either party hereto may demand an arbitration by reference to a Board of Arbitration, to consist of one person selected by Contractor, and one person selected by Sub-contractor, these two to select a third, and in case these two fail to select a third within three days, he shall be named by the Architect or his authorized representative. In case either Contractor or Sub-contractor fails to name an arbitrator within three days after requested to do so, the Archi-

tect, or his authorized representatives, shall name an arbitrator to represent the party so failing to name one. The written decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such reference. Arbitration of a demand or decision by the Architect or Owner shall be made within 5 days following notification to Sub-contractor of such demand or decision, otherwise Sub-contractor shall be bound thereby, unless the Owner shall agree to arbitration after that period. Provided, nothing contained herein shall excuse Sub-contractor from completion of the work in the manner provided in this contract nor shall the pendency of any dispute or arbitration proceeding excuse any delay, deficiency, default or noncompliance therewith."

Pursuant to such provision an arbitration proceeding was instituted between Commonwealth and Samford on the five sub-contracts (A. 31). Upon the institution of the Arbitration proceedings, the Sureties obtained orders in the United States District Court staying the actions against them pending the decision in the arbitration proceeding (A. 3, 13). (Civ. 441-62, 442-62.)

The Arbitration before three arbitrators resulted in a unanimous award on November 12, 1963 in favor of Samford discharging it from all liability to Commonwealth for any part and all of the unpaid balances on the sub-contracts in the sum of $142,435.51, and awarding Samford $15,872.35, which was the amount by which it was decided the completion costs in the sum of $158,307.36 exceeded the unpaid balances (A. 34).

Commonwealth then moved in the United States District Court to vacate the award on the ground, among others, that there was evident partiality in the arbitrators, that after the rendition of the award, Commonwealth learned that the third arbitrator and chairman of the Board of Arbitration had a prior association with Samford which had not been disclosed to Commonwealth, and that if Commonwealth had known of such prior association, it would not have consented to his appointment as an impartial arbitrator (A. 15, 21, 36, 54, 55-61). (Civ. 65-64, Federal Arbitration Act; 9 U. S. Code §10.) Commonwealth's motion to vacate the award was consolidated with the actions against the sureties, and left in abeyance until a final decision on the merits (A. 84).

Hearings were had in the District Court with respect to the prior association of the third arbitrator with Samford (A. 74-183). At the conclusion thereof, the District Court denied the motion, confirmed the award and directed judgment in favor of Samford and the sureties (A. 184-186, 187). Judgment was entered in the District Court on September 30, 1966 (A. 187). The Court of Appeals affirmed on September 27, 1967 (A. 192).

The facts as to the prior employment by respondent Samford of the third or "neutral" arbitrator Capacete, prior to the arbitration proceeding, on the very projects involved in the arbitration, as well as other projects, and the concealment thereof from the petitioner.

In accordance with the arbitration procedure established in the subcontracts Commonwealth designated as one arbitrator an attorney named Holman (A. 145). Samford designated arbitrator Chapman (A. 99). These two arbitrators designated one Jose L. Capacete as the third arbitrator and chairman of the Board of Arbitration (A. 135). Holman died 2 or 3 days after the first meeting of the arbitrators (A. 76, 145). Commonwealth's attorney asked Capacete if he knew the names of lawyers who in his opinion had been involved or knew anything about engineering. Capacete gave him a list of 5 or 7 lawyers. Among these was Hector Martinez Munoz, an attorney, who was designated by Commonwealth to take the place of the deceased arbitrator (A. 145, 146). At the time of the designation of the arbitrators, and prior to the arbitration hearings, Commonwealth's attorney, Carlos A. Romero Barcelo, investigated the arbitrators. He made the following affidavit in the District Court (A. 54):

> "I, CARLOS A. ROMERO BARCELÓ, under oath do hereby state as follows:
>
> 1—That my name is as aforesaid, that I am of legal age, single, Attorney at Law, and resident of San Juan, Puerto Rico.
>
> 2—That I have been the Attorney for Commonwealth Coatings Corp. in its claim against the bonding com-

panies and A. C. Samford Overseas, Inc., which claims were finally submitted to arbitration by order of this Court.

3—At the time of the designation of the arbitrators and prior to the arbitration hearings I investigated the arbitrators to discover if any of them had, in the present or past, any business or financial relationship with A. C. Samford Overseas, Inc. or any of its affiliated or holding companies or with Mr. Amos Samford himself. I found none.

4—None of the arbitrators ever informed me that any of them had any business or financial relations as aforesaid with Samford or any of his companies.

5—As a Lawyer, if I had known of any such relationship, I would have challenged said arbitrator's capacity.

IN WITNESS WHEREOF, I hereby sign my name on this 6th day of February, 1964 at San Juan, Puerto Rico.

CARLOS A. ROMERO BARCELO"

At the hearing in the United States District Court on the motion to set aside the award, Mr. Romero testified with reference to the failure of counsel for respondent to disclose the prior relationship between Samford and Capacete, as follows (A. 151):

"Q. Did Mr. Currie at any time during any of the examinations or before the arbitration was started ever tell you anything about Mr. José Luís Capacete's prior relationship with the Samford Company? A. No, he did not.

Q. If you had been told that would you have objected? A. I don't think I would have objected because I know Mr. Capacete, but I would certainly have told my client and given them the opportunity to determine.

Q. So as a result you never told them? A. No."

The respondents introduced no evidence to contradict the above testimony.

Subsequent to the rendition of the award by the arbitrators, Commonwealth discovered that Capacete had been employed by Samford in various matters including the very projects which were the subject of the arbitration, and had received payment from Samford for such services (A. 59).

Capacete testified on the hearing in the District Court as follows (A. 135-137):

"Q. Then, Mr. Capacete, did you meet, did you know Mr. Samford before this proceeding? A. Yes.

Q. How well did you know him? A. Well, I have seen him personally about four or five times. But I have done some work for his company.

Q. Prior to the commencement of the arbitration? A. Yes.

Q. And have you done work in any of the projects involved in this matter? A. Yes.

The Court: We had evidence to that. Mr. Capacete testified in some other hearing about that same thing.

Mr. Romero: I don't think so. Briefs were filed but there was no evidence.

Q. Mr. Capacete, you had worked for the oncological hospital and the Aguadilla housing projects, is that correct? A. Do you want me to give you a summation?

Q. Fine. A. During the years 1957 or 1958 to 1961 or 1962 I did some work for Samford Company of Puerto Rico and the Samford Company of the Virgin Islands. I did some drilling for foundation investigations and laboratory testing of materials. In several of these jobs, like the Aguadilla Housing Project and the oncological hospital, I believe the power plant, I did some work for the architects which indirectly was on the project where Samford's work was being carried on, but also I did some testing work for Samford after construction started. The work for the architects was prior to construction.

During construction I did some work in the testing laboratory.

Q. And you also did some work in the project in St. Croix? A. Yes.

The Court: You did that in your own personal capacity or for Foundation Engineering Company?

A. As Foundation Engineering Company of Puerto Rico, which I owned and which I supervise naturally.

Q. Was Samford aware of that fact, of course, Amos Samford? A. Yes, sir.

Q. Do you know whether Mr. Currie was aware of that fact? A. I have to say I imagine so, because I really don't know what goes through Mr. Currie's mind.

Q. Did you know Mr. Stein or Mr. Marcus before

commencement of the arbitration? A. No, sir. I met them at the arbitration.

Q. Did you know Mr. Manuel Nieto? A. No, I met him at the arbitration.

Q. Were you ever advised by Samford or their attorneys that this matter should be disclosed? A. No.

Q. Did you have any reason to believe that this matter should be disclosed? A. No.

Q. Was it ever disclosed? A. No."

Capacete further testified with reference to the payments received by him from Samford as follows (A. 139):

"Q. Would you indicate specifically what the services were? A. The services were drilling for foundation investigations, drilling for prospecting quarry in St. Croix and for testing construction materials such as sand, gravel and concrete and concrete blocks and compaction of the soil.

Q. During what period of time were these services rendered? A. Approximately 1957 to 1961 or perhaps 1962. But in about five years. Four or five years.

Q. How much money was involved in the rendering of these services, more or less? A. I would say in the order of—

Q. How much per year, let's say? A. Total I would say in the order of $12,000."

He testified with reference to the payments received for services rendered on the projects involved in the arbitration as follows (A. 140):

"Q. Mr. Capacete, do you recall specific projects involved in this arbitration? A. There were five proj-

ects to the best of my recollection. The Aguadilla Housing Project called Wherry Housing Project for the Armed Forces, laundry and power plant, oncological hospital and I don't remember the other.

Q. Do you recall whether your company did any work in connection with these projects? A. Yes. We did in about two or three of those projects, we did some testing work.

Q. Which had no relationship at all to the painting work? A. No.

Q. Do you recall about how much money was involved in these services? A. In the order of three or four thousand dollars, maybe two or three thousand dollars. I don't recall the exact figure.

Q. Was that work done for Samford or are you referring to work done prior to it? A. No, work done for A. C. Samford Company."

At one time Capacete was going to resign but at the request of counsel for the respondent he remained as arbitrator. His testimony was as follows (A. 135):

"Q. At one time you were going to resign from the Board of Arbitration? A. That's right.

Q. And you did write a letter to the parties to that effect, is that correct? A. Yes.

Q. Did anyone talk to you about not resigning? Did anyone talk you out of resigning? A. At one time I mentioned it to Mr. Currie and he said, if you are not going to Europe right now why don't you stay as Chairman of this Board, and I said, all right, I will, and I stayed."

It is to be noted that no representative of Samford took the stand to testify with respect to its prior business relationship with Capacete.

The extent of the concealment by the respondents of the relationship between Capacete and Samford is highlighted by the fact that when the arbitrator originally designated by Commonwealth died, and at the very time that respondents were concealing the prior business relationship with Capacete, counsel for the respondent sureties imposed a condition to the appointment of any substitute arbitrator by Commonwealth that he should have no prior business relationship with the parties. The above appears from the following colloquy between the Court and counsel on the hearing in the United States District Court (A. 88, 89):

> "Mr. Romero: We are attacking the other party who knew and should have known that this was a matter to be disclosed, so much so that the other party waived its right, upon Mr. Holman's death, for the naming of a new arbitrator, saying we were allowed to name a new arbitrator subject to the fact there was no business or prior relation between said arbitrator and the parties, that they should have notified our plaintiff of this fact so plaintiff could have made up its mind as to whether or not it would have accepted that arbitrator and they failed to so notify.
>
> • • • • •
>
> Mr. Romero: The only aspect to bring today is the fact that the Samford people knew about this and when we were going to name our arbitrator, one of the conditions they had on that was that our arbitrator had no prior relations with the parties.

The Court: You did not put the same conditions?

Mr. Romero: Your Honor, we did not assume such conditions existed. To us this is evidence of a guilty conscience.

The Court: This isn't a criminal case.

Mr. Romero: That Samford was aware of the situation and they were making sure the same situation did not exist on our side."

To the above, counsel for the respondents stated as follows (A. 91-92):

"Mr. Currie: We will attempt to expedite this and move forward, and I think I can cover every point. With reference to the first issue, it is very simple. I am dealing now with the requirement that Samford in giving Commonwealth Coatings the right to fill a vacancy on the Arbitration Board in a letter merely stated, we allow you to appoint anyone of your desire, provided, of course, reserving the right to object because they have an interest in the litigation or are involved in it. That was a very reasonable thing and quite understandable. The contract provided—

The Court: That argument, I am not going to pay any attention to that.

Mr. Currie: No need to go into that?

The Court: If they have the right they should have exercised it, regardless of whether your client insisted on that requirement as to the other arbitrator.

Mr. Currie: What happened, very simply, was that each party appointed an arbitrator. Those two appointed a third, one died, there was a vacancy, and under the law we could have applied to the Court to

fill the vacancy, but since Commonwealth arbitrated that, we told them they could fill the vacancy by anyone provided the person didn't have an interest in the arbitration. We had the right to make that inquiry and reservation the same as they did."

Capacete testified with reference to his friendship with petitioner's attorney Romero as follows (A. 146):

"Q. Mr. Capacete, how well do you know Mr. Romero or did you know Mr. Romero at the time of this hearing? A. Oh, yes, very well.

Q. Were you social friends? A. Well, I am a very old friend of his father. His father was one of the highest esteemed engineers in this island and then Carlos was together with me in the Rotary Club and I know him well, I would say, as a good friend of mine."

In other words, throughout the arbitration proceeding, Capacete concealed his relationship with respondent Samford even from his "good friend," the attorney for the petitioner.

The evidence indicates without contradiction that Capacete and respondents concealed their prior business relationship from the petitioner.

SUMMARY OF ARGUMENT

1. The concealment by arbitrator Capacete and respondent Samford prior to and throughout the arbitration proceedings of Capacete's prior employment by Samford on the very projects involved in the arbitration as well as on other projects rendered the award in favor of respondent Samford invalid under the Federal Arbitration Act.

2. Capacete, as the third or "neutral" arbitrator designated by the party-appointed arbitrators, is held to a standard of impartiality not required of the other arbitrators. His failure to disclose his prior business relationship with respondent Samford constituted a breach of such standard and evident partiality within the meaning of the Federal Arbitration Act.

3. On the undisputed facts as to the concealment of the business relationship between arbitrator Capacete and respondent Samford, public policy, as indicated by the Federal Arbitration Act, requires the vacating of the award herein.

POINT I

The failure to disclose the business relationship between arbitrator Capacete and respondent Samford constituted evident partiality, corruption, fraud and misbehavior so as to render the award in favor of said respondent invalid under Section 10 of the Federal Arbitration Act.

The Court of Appeals held in its opinion herein as follows (A. 193):

> "In our opinion there is a difficult line between what should, in good faith, be volunteered, and what may be left for inquiry. We may agree with appellant that where there is a disturbingly close relationship the very failure to make disclosure could be evidence of partiality, and we think it would have been far better if there had been disclosure here. However, we cannot say that the relationship was sufficiently close to establish 'evident partiality' within the statute as a matter of law."

We submit that there could not be a more disturbingly close relationship than the employment by the respondent Samford of the "neutral" arbitrator on the very projects involved in the arbitration, for which employment said arbitrator was paid by said respondent.

In *Rogers* v. *Schering Corporation*, 165 F. Supp. 295 (D. C. N. J., 1958), *aff'd* 271 F. 2d 266 (3 Cir., 1959), cert. den. 359 U. S. 991, which involved a motion to vacate an arbitrators' award, it developed during the hearings in the arbitration that the firm of one of the arbitrators had previously done business with one of the parties, that such

arbitrator had disclosed this fact to the American Arbitration Association prior to his appointment in response to an inquiry concerning circumstances capable of suggesting bias or possible disqualification. However, this disclosure was not communicated by the Arbitration Association or the arbitrator involved to the other party. The latter's counsel raised the issue of disqualification of such arbitrator by reason of such prior business relationship.

The Court referred to the Federal Arbitration Act (9 U. S. C. §10) providing for vacating an award where "evident partiality" or corruption exists. The Court vacated the award, holding as follows (p. 301):

> "The failure of the Administrator (of the American Arbitration Association) to communicate to the parties information disclosed by a prospective arbitrator bearing upon circumstances likely to create a presumption of bias, and the consequent prevention of the party to proffer a timely objection based upon that information, is more than a loose procedural informality. It goes to the heart of a body designed to resolve controversy—its integrity. In this instance it fails to protect what might be termed 'due arbitration process'."

The case at bar presents a much more stronger situation than *Rogers*. In our case, the respondents, their counsel; and Capacete not only deliberately failed to disclose the prior business relationship between Samford and Capacete, but they even went so far, during such concealment, as to impose a condition that a new arbitrator to be named by appellant should not have had a prior business relation with the parties (A. 88, 89); and when Capacete wanted to resign, respondent's counsel induced him to stay (A. 135).

In *Milliken Woolens, Inc.* v. *Weber Knit Sportswear, Inc.*, 202 N. Y. S. 2d 431, 11 A. D. 2d 166, *aff'd* 9 N. Y. 2d 878, 175 N. E. 2d 826, a motion to vacate an arbitration award on the ground of undisclosed prior relationships by arbitrators with one of the parties was granted. In that case the statute (Sec. 1462 of the New York Civil Practice Act) contained a provision identical to the Federal Arbitration Act, 9 U. S. C. Section 10(b) that an arbitration award may be vacated where there is "evident partiality," or where the arbitrators are guilty of any misbehavior by which the rights of any party have been prejudiced. In that case, there was no attempt to prove actual partiality, but it was contended that the award must be vacated because of the prior relationship, unknown and undisclosed, between the arbitrators and the respondents.

The Court held:

> "Since the waiver (of objections to partiality) is a matter of intention (Matter of City of Rochester, 208 N. Y. 188, 197, 101 N. E. 875, 877, 47 L. R. A., N. S., 151), the touchstone in these arbitration cases is the knowledge, actual or constructive, in the complaining party of the tainted relationship or interest of the arbitrator. Thus in Dukraft Manufacturing Co. v. Bear Mill Mfg. Co., 22 Misc. 2d 1057, 151 N. Y. S. 2d 318, McNally, J., set aside an award because no disclosure was made that business transactions between the arbitrator and one of the parties had increased considerably during the pendency of the arbitration proceeding. In Shirley Silk Co. v. American Silk Mills, 260 App. Div. 572, 23 N. Y. S. 2d 254, an award was vacated where the arbitrator designated by the respondent failed to reveal to appellant that, prior to the arbi-

tration, the firm of which the arbitrator was president had received a substantial award (in another arbitration) from a board of arbitrators of which the president of respondent was a member. See also Knickerbocker Textile Corp. v. Sheila-Lynn, Inc., 172 Misc. 1015, 16 N. Y. S. 2d 435, affirmed 259 App. Div. 992, 20 N. Y. S. 2d 985."

The Court quoted from *In Matter of Friedman*, 215 App. Div. 130 at p. 136, 213 N. Y. Supp. 369, at p. 375 where it was said:

"During recent years arbitration has been more and more resorted to for the settlement of business controversies. It therefore becomes of the utmost importance that in statutory proceedings of this character, where the rights of parties are adjudicated, not by trained lawyers and judges, but by fellow-businessmen, every safeguard possible should be thrown about the proceeding to insure the utmost fairness and impartiality of those charged with the determination of the rights of the parties. Nothing should be permitted to throw suspicion even upon the entire impartiality of arbitrators. The finality of an award of arbitrators, as compared with the reviewable decision of a judge or a referee, makes this all the more important, and that the tribunal which is to pass upon the rights of the parties be not subject to the slightest suspicion as to its fairness."

In 5 American Jurisprudence 2d, on Arbitration and Award, p. 652, Section 181, on Partiality of Arbitrators, it is said:

> "Partiality on the part of arbitrators is a well-recognized ground for the setting aside of awards. It is not necessary, in order to warrant the intervention of equity, that the partiality be evidenced by an unjust award. It has been held sufficient that the relationship between the arbitrators and one of the parties is of such a nature as to give clear grounds for suspicion of their proceedings and render it unlikely that they constituted the fair and impartial tribunal to which the other party is entitled."

In *American Guaranty Co.* v. *Cauldwell,* 72 F. 2d 209, 212 (1934, 9th Cir.), it was held that a business relationship between the arbitrators and one of the parties was sufficient to set aside an award as "inherently partial even though not corrupt or fraudulent."

In Glick, "Bias, Fraud, Misconduct and Partiality of the Arbitrator," Arbitration Journal, Vol. 22, p. 161 (1967), it is said:

> "One of the most complex issues that has resulted in frequent litigation is the determination of partiality and bias. A number of clearly disqualifying criteria have emerged. It has been held that an arbitrator presumably was not impartial when he * * * had an undisclosed form of business relationship with one of the parties * * *" (citing *Application of Siegel,* 153 N. Y. S. 2d 673 (1956)).

And in 7 De Paul Law Review 236 at page 239, in an article on "When May an Arbitrator's Award Be Vacated?" it is said:

"Thus, in cases where the conduct of the arbitrator has been found to be unjustified, the award will be set aside, and it is immaterial that the complaining party has not been damaged, or that the arbitrator has acted in good faith; the misconduct per se is sufficient.

"'It is not his [the arbitrator's] own consciousness of rigid justice that can support his determination of the controversy, nor his conviction in his own mind that he is so that can suffice. It is his external actions that will be subjected to scrutiny; and if these do not satisfactorily bear the test, the award will fall.'" (Citing Morse, Arbitration and Award, c. 19 (1892).)

In *Knickerbocker Textile Corp.* v. *Sheila-Lynn, Inc.*, 172 Misc. 1015, 16 N. Y. S. 2d 435, a "neutral" arbitrator was held to be disqualified and the award was vacated. The court quoting from *Dorlon* v. *Lewis*, 9 How. Pr. 1, said:

"'The fact that the referee is a man of high character and unquestioned integrity should not be allowed to influence the determination of that question; for it is essential to the administration of justice that even the appearance of evil should be avoided, and, where a man who accepts the position of referee has such relations with one of the parties to the litigation as to make it improper that he should decide the questions submitted to him, his character is not at all material, and the Court will enforce that rule against a man of high character as well as against one whose character is not so good.'"

In *Merolla* v. *Motor Vehicle Accident Indemnification Corporation,* 231 N. Y. S. 2d 760 (1962), it was stated:

> "The first requisite of an arbitrator is judicial impartiality and freedom from bias. 'In undertaking to act as arbitrators they assume a quasi judicial position. It follows therefore, that the existence of any facts which may operate to affect the impartiality of arbitrators will render such arbitrators incompetent to make a valid award, provided such facts were unknown to the complaining party.' (5 Corpus Juris, p. 63, 6 C. J. S. Arbitration and Award §46.)"

In *Kemp* v. *Rose,* 1 Giff. 258, 265, 65 Eng. Rep. 910, 913, the Court held:

> "Therefore, when it turns out that, unknown to one or both of the persons who submit to be bound by the decision of another, there was some circumstance in the situation of him to whom the decision was intrusted which tended to produce a bias in his mind, the existence of that circumstance will justify the interference of this Court.
>
> "Whether in fact the circumstance had any operation in the mind of the arbitrator must, for the most part, be incapable of evidence, and may remain unknown to every human being, perhaps even unknown to himself. It is enough that such a circumstance did exist. * * * "

POINT II

A neutral arbitrator in a tripartite arbitration is held to a strict standard of impartiality not required of arbitrators appointed by the parties.

The position of the third or "neutral" arbitrator on a tripartite board has been distinguished from that of arbitrators designated by the parties themselves.

Whereas the courts have recognized that in a tripartite arbitration it is not to be expected that the arbitrators appointed by the parties should be completely neutral, the same situation does not apply to the third, or neutral, arbitrator, appointed by the two arbitrators designated by the parties.

Astoria Medical Group v. Health Insurance Plan, 11 N. Y. 2d 128, 133-134, 227 N. Y. S. 2d 401, 182 N. E. 2d 85, is a leading case on the subject of tripartite arbitrations. The Court there noted the difference between arbitrators selected by the parties and the neutral arbitrators, as follows:

> "This type of tripartite arbitration provision, requiring each side to name its own arbitrator and such party-designated arbitrators to agree upon a third neutral arbitrator, is one which has been widely used in both labor and commercial arbitration. (See Bell Aircraft Corp., 13 L. A. 813, 820-821; Lesser, Tripartite Board or Single Arbitrators in Voluntary Labor Arbitration?, 5 Arb. J. [N. S.] 276; Phillips, A Lawyer's Approach to Commercial Arbitration, 44 Yale L. J. 31, 47; Pirsig, The New Uniform Arbitration Act, 11 Business Lawyer [April, 1956] 44, 47; Note, The Use

of Tripartite Boards in Labor, Commercial, and International Arbitration, 68 Harv. L. Rev. 293, passim.) Arising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be 'neutral', at least in the sense that the third arbitrator or a judge is. And, as might be expected, the literature is replete with references both to arbitrators who are 'neutrals' and those who are 'partial', 'partisan' or 'interested' and to arbitration boards composed entirely of 'neutrals' and those contrastingly denominated 'tripartite in their membership'. (Elkouri & Elkouri, How Arbitration Works [Rev. ed., 1960], p. 48; also, pp. 53, 61; see, also, Lesser, Tripartite Boards or Single Arbitrators in Voluntary Labor Arbitration?, 5 Arb. J. [N. S.] 276, 279; Phillips, A Lawyer's Approach to Commercial Arbitration, 44 Yale L. J. 31, 47-48; Taylor, The Arbitration of Labor Disputes, 1 Arb. J. [N. S.] 409, 413.)"

The following note is annexed to the majority decision of the Court in the *Astoria Medical* case, *supra*, p. 138:

"As previously indicated (supra 11 N. Y. 2d p. 134, 227 N. Y. S. 2d 405, 182 N. E. 2d 87), the Advisory Committee on Practice and Procedure took 'cognizance of the common practice of each party appointing his own arbitrator who is not individually expected to be neutral' and declared that 'partiality of such arbitrators should not be a ground for vacating the award' (Second Preliminary Report of the Advisory Committee on Practice and Procedure [N. Y. Legis. Doc., 1958, No. 13], p. 146). To carry out its recommenda-

> tions, the Advisory Committee introduced a bill at this 1962 session of the Legislature (S. Int. 26, Pr. 26), now awaiting action by the Governor, which permits a vacatur of an award only where the 'partiality' is that 'of an arbitrator appointed as a neutral' (CPLR, §7511, subd. [b], par. 1, cl. [ii])."

The bill referred to in the above note was enacted into law and has become part of the Civil Practice Law and Rules (CPLR) of the State of New York. Section 7511 thereof referred to in the note provides as a ground for vacating an arbitration award, in addition to corruption, fraud or misconduct in procuring the award, "partiality of an arbitrator appointed as a neutral".

A similar provision is included in the Uniform Arbitration Act, which has been adopted in other States, and which gives ground for vacating an arbitration award where:

> "There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party."

The above provision appears in the statutes of Illinois, in Chapter 10, Smith-Hurd's Illinois Annotated Statutes §112(a)(2); Arizona, §12-1512, Arizona Revised Statutes; Maryland, in Art. 7 Annotated Code of Maryland §12; Massachusetts, in c. 251 Annotated Laws of Massachusetts §12; Minnesota, in Minnesota Statutes Annotated §572.19; and Wyoming, in Wyoming Statutes, 1957, §1-1048.12.

California provides for vacation of an arbitration award where "The rights of such party were substantially preju-

diced by misconduct of a neutral arbitrator" (Deering's California Code of Civil Procedure §1286.2).

It is apparent from the above that a strict standard of impartiality is applied with respect to a neutral arbitrator, which does not apply to arbitrators appointed by the parties.

Judge Fuld, who wrote the majority opinion in the *Astoria Medical* case wrote a dissent in *Cross Properties, Inc.* v. *Gimbels Bros. Inc.*, 12 N. Y. 2d 806, 236 N. Y. S. 2d 61, 187 N. E. 2d 129, in which he said:

> "In view of the fact that an award made by arbitrators is well-nigh conclusive, the courts must be especially careful, when the impartiality or objectivity of an arbitrator, appointed as a neutral, is challenged, to make certain that there were no undisclosed disqualifying relationships between such arbitrator and a party which might have prevented him from rendering an unprejudiced or independent decision. This has been a long-drawn-out, complicated and expensive proceeding, but I do not see how, if the integrity of the arbitral process is to be assured, we may uphold the determination made in this case. I would, therefore, reverse the order and judgment appealed from and vacate the award for the reasons stated by Justice Valente in his dissenting opinion below."

In I Industrial & Labor Relations Review, 386, at page 399 (1947-1948), an article on "Hazards in Labor Arbitration," it is said:

> "The judicial character of a tripartite type arbitration depends on the scrupulous impartiality of the disinterested member of the tripartite type panel".

In Harvard Law Review, Vol. 68, No. 2, pages 293-339 at page 319, on the use of tripartite type boards, it is said, "Counsel is not to assume, however, that the party-appointed commercial arbitrator will approach the case with the impartiality of a neutral arbitrator".

Reference to statutory changes as to partiality by a neutral arbitrator was noted in the Arbitration Journal, Vol. 14 (1959) in an editorial entitled "The Dilemma of Tripartite Type Arbitrations" where it is said (p. 199):

> "Following adoption of a Uniform Arbitration Act by the National Conference of Commissioners on Uniform State Laws, several states enacted or amended their laws so as to distinguish between 'evident partiality' by an arbitrator 'appointed as a neutral' and similar conduct by party-appointed arbitrators. In the former event, an award would be vacated, but not in the latter."

POINT III

Public policy, as indicated by the Federal Arbitration Act, requires that the award herein be vacated.

The discussion thus far relates to the prejudice to the petitioner and deprivation of its right to an arbitration free from partiality, bias, corruption and misconduct.

There remains to be discussed the public interest in a decision by this Court construing the Federal Arbitration Act with respect to vacating awards in arbitration where elements of partiality, fraud, corruption or misconduct appear.

In *Wilko* v. *Swan*, 346 U. S. 427, 74 S. Ct. 182, 98 L. Ed. 168, this Court said (p. 431):

> "The United States Arbitration Act establishes by statute the desirability of arbitration as an alternate to the complications of litigation. The reports of both Houses on that Act stress the need for avoiding the delay and expense of litigation [citing authorities], and practice under its terms raises hope for its usefulness both in controversies based on statutes [citing authorities], or on standards otherwise created [citing authorities]."

Among the standards referred to by this Court for practice under the United States Arbitration Act were those stated in *Kentucky Leather Mills* v. *Jackson*, 206 Fed. 2d 111, 117 (6 Cir. 1953), cited by this Court in the *Wilko* decision, where it was said:

> "But it is the proof of bias, unfairness or partiality on the part of an arbitrator that results in unjust advantage, and calls for the setting aside of the award (citing cases). For arbitrators are selected to act in quasi-judicial capacity, in the place of a court, and must be fair and impartial so as to render a faithful, honest and disinterested opinion in carrying out their obligation to do justice to the parties through their award."

We submit that concealment of a prior business association by a neutral arbitrator and by the party by whom he was employed relating to the very projects involved in the arbitration does not conform to the above standards.

The very fact that arbitration awards may not be set aside for errors of law or fact, and that arbitrators may

receive all evidence whether or not such evidence would be admissible in a Court proceeding, and that to all intents and purposes an arbitration award is conclusive and final, makes it all the more imperative that such awards be free from any suspicion of bias or taint of partiality.

So in *Cahn* v. *International Ladies Garment Union, et al.*, 203 Fed. Supp. 191 (1962, U. S. D. C. E. D., Pa.) the Court said:

> "It was stated in Hoosac Tunnel Dock & Elevator Co. v. O'Brien, 137 Mass. 424 (1884), at page 426:
>
> 'An arbitrator is a quasi-judicial officer, under our laws, exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of opinion that the same immunity [from suit] extends to him' ". (Bracketed matter supplied.)

In Webster, 9 Syracuse Law Review 56 (1958, at p. 60) it is said:

> "The existence of certain relationships between an arbitrator and one party, unless waived, may be sufficient to disqualify the arbitrator. The arbitrator is regarded as having a duty to disclose this relationship. When there is a relationship which should be revealed, the actual presence of bias on the part of the arbitrator is irrelevant. Thus an arbitrator who is a relative of one of the parties may be disqualified. A business connection, such as being a law-office associate or a partner of one of the parties to the dispute, constitutes an objectionable relationship."

And further at page 61 it is said:

> "The standard of conduct to which an arbitrator is held has been analogized to the standards which govern the conduct of a judge. The presence of a corrupt intent is not requisite to a finding of misconduct, but either actual prejudice or a bona fide possibility of prejudice is necessary."

CONCLUSION AND PRAYER FOR RELIEF

The order and judgment of the United States Court of Appeals should be reversed, the arbitration award herein vacated, and the parties directed to select a new board of arbitrators to hear and determine the controversy between them, de novo; or in the alternative as prayed for by petitioner (A. 56) the United States District Court be directed to hear and determine such controversy; and all the costs of said arbitration and proceedings herein should be assessed against the respondents.

Respectfully submitted,

EMANUEL HARRIS
Attorney for Petitioner
30 Vesey Street
New York, N. Y. 10007
Telephone (212) 267-5700

EMANUEL HARRIS
MAX E. GREENBERG
SAYWARD MAZUR
On the Brief

APPENDIX "A"

Statute Involved

FEDERAL ARBITRATION ACT

Title 9 U. S. Code

§2. *Validity, irrevocability, and enforcement of agreements to arbitrate.*—A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§3. *Stay of proceedings where issue therein referable to arbitration.*—If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§9. *Award of arbitrators—Confirmation—Jurisdictional —Procedure.*—If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

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IN THE

Supreme Court of the United States

October Term, 1967

No. [redacted] 14

COMMONWEALTH COATINGS CORPORATION,
Petitioner,

-v.-

CONTINENTAL CASUALTY COMPANY, FIREMAN'S FUND INSURANCE COMPANY AND A. C. SAMFORD OVERSEAS, INC.,
Respondents.

BRIEF OF RESPONDENTS

LUTHER P. HOUSE, JR.
Attorney for Respondents
1405 Fulton National Bank Building
Atlanta, Georgia 30303
Telephone 404-521-3800

FEDERICO RAMIREZ ROS
208 First Federal Building
Stop 23, Ponce de Leon Avenue
Santurce, San Juan, Puerto Rico

OVERTON A. CURRIE
EDWARD H. WASSON, JR.
1405 Fulton National Bank Building
Atlanta, Georgia 30303
On the Brief

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LUTHER P. HOUSE, JR.
Attorney for Respondents
1405 Fulton National Bank Building
Atlanta, Georgia 30303
Telephone 404-521-3800

FEDERICO RAMIREZ ROS
208 First Federal Building
Stop 23, Ponce de Leon Avenue
Santurce, San Juan, Puerto Rico

OVERTON A. CURRIE
EDWARD H. WASSON, JR.
1405 Fulton National Bank Building
Atlanta, Georgia 30303
On the Brief

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QUESTION PRESENTED

Were the District Court and the Court of Appeals not correct and justified in holding that under the Federal Arbitration Act an arbitration award should be confirmed (and not automatically vacated as contended by the objecting party where there have been previous business relations between an arbitrator and a party, irrespective of any other considerations) when:

(a) The business relations were remote, isolated, casual and insubstantial, and occurred a year or more prior to the arbitration proceedings;

(b) No inquiry was made of the party or the arbitrator about business relations although the objecting party (a subcontractor), whose counsel was a close personal friend of the arbitrator, knew the respective businesses of the arbitrator (performing engineering consulting services for the construction industry) and the party (a general contractor), knew these businesses were closely related (the firm with which the arbitrator was associated having performed engineering consulting services for most of the contractors in the area), knew of the prominent reputation of the arbitrator in his field, and knew of the substantial business engaged in by the party in the area;

(c) The objecting party admitted that such business relations had no effect on the honesty or integrity of the arbitrator and that the arbitrator did not act improperly in any way, therefore admitting that such business relations had no effect on the arbitration proceedings or the award; and

(d) The arbitration proceedings were in fact conducted in a fair and impartial manner?

STATEMENT OF THE CASE

1. Proceedings Below

Petitioner, Commonwealth Coatings Corporation, on November 26, 1962, filed two suits, Civil Actions Nos. 441-62 and 442-62, in the United States District Court for the District of Puerto Rico against Respondents, Continental Casualty Company (hereinafter sometimes referred to as "Continental") and Fireman's Fund Insurance Company (hereinafter sometimes referred to as "Fireman's Fund"). R. I, 1; II, 50. Civil Action No. 441-62 was brought separately as a Miller Act suit under 40 U.S.C.A. §270(b). Both actions were brought by Petitioner as a subcontractor of Respondent, A. C. Samford Overseas, Inc. (hereinafter sometimes referred to as "Samford") on six large construction projects in Puerto Rico,[1] which Samford was constructing as general contractor, against Continental and Fireman's Fund as the construction sureties of Samford, alleging that Samford had breached the subcontracts and praying for damages under the surety bonds.

Prior to the bringing of these suits, upon the total abandonment of work on five of the projects by Petitioner during June and July, 1962, and the resulting termination of Petitioner as a subcontractor on the projects, Respondent Samford had demanded arbitration of the disputes between Petitioner and Samford

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[1]Although Action No. 441-62 included a count seeking damages on the subcontract between Petitioner and Respondent Samford on the Ionospheric Research Facilities Project for the United States Government in Arecibo, Puerto Rico, (R. I, 1(4)), the matter was resolved and was not an issue in the subsequent arbitration and litigation.

under the arbitration clauses present in the subcontracts, and Petitioner and Samford had agreed to the resolution of the disputes by arbitration. A. 31, 69-70. Upon motions by the defendants in said actions, the actions were stayed by the District Court on March 12, 1963, pending the outcome of the arbitration proceedings.[2] A. 3, 13.

Hearings were had before a panel of three arbitrators commencing August 14, 1963, and continuing through August 18, 1963, when the hearings were recessed until August 31, 1963. On August 31, 1963, the hearings were resumed and continued through September 3, 1963, when the hearings were adjourned. A. 63. In the arbitration proceedings Samford asserted its claim that Petitioner had breached the subcontracts, not Samford, and claimed damages resulting from the breach.

On November 12, 1963, the arbitrators issued their unanimous written arbitration award in favor of Samford and against Petitioner for $15,872.35. A. 30-35.

On January 24, 1964, Respondents Continental and Fireman's Fund in Actions Nos. 441-62 and 442-62 filed motions to dismiss said actions on the basis of the issuance of the arbitration award in favor of their principal obligor, Samford. A. 4, 14.

On February 7, 1964, Petitioner filed a petition and motion verified February 1, 1964, in Civil Action No. 65-64 against Respondent Samford to vacate the arbitration award. A. 21, 36-53. On February 28, 1964, the Dis-

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[2]Decision reported, *U.S. for Use and Benefit of Commonwealth Coatings Corp. v. Continental Cas. Co.*, 214 F.Supp. 949 (D.C.P.R. 1963).

trict Court stayed further proceedings in Civil Action No. 65-64 until further order by the United States District Court for the Southern District of New York in Action No. 63-B-903, which had issued a stay of all litigation against Respondent Samford. On June 15, 1965, Petitioner filed a supplemental petition and motion, verified May 6, 1965, in Civil Action No. 65-64 to vacate the arbitration award and set the matter for trial. A. 22, 55-61. Samford thereupon filed its Response, Answer and Counterclaim in Civil Action No. 65-64 on July 8, 1965, praying for confirmation of the award and entry of judgment for Samford. A. 23, 62-73.

Hearings of the motions pending in Civil Actions Nos. 441-62, 442-62 and 65-64 were had in the United States District Court for Puerto Rico on June 25, 1965 and July 16, 1965. A. 5-6, 15-16, 23-24. On January 4, 1966, the District Court of Puerto Rico formally consolidated Civil Actions Nos. 441-62, 442-62 and 65-64 for trial and all proceedings thereafter, and denied the motions of Respondents Continental and Fireman's Fund in Civil Actions Nos. 441-62 and 442-62 for dismissal of the complaints and ordered that the stay order issued by the District Court in both cases on March 12, 1963, remain in full force and effect until the issues raised in Civil Action No. 65-64 challenging the arbitration award were tried and decided on the merits; Petitioner's motion to vacate the arbitration award was ordered left in abeyance until a final decision was rendered on the merits by the District Court. A. 83-85.

On February 14, 1966, the three cases were called for trial, and testimony and argument of counsel were presented by the parties. A. 17-18, 86-183. The District

Court issued its memorandum and judgment confirming the award on September 30, 1966, determining that the hearings were fair and impartial, and ordering that Samford recover $15,872.35 from Petitioner with costs.[3] A. 184-187. Petitioner filed notice of appeal in all three cases October 27, 1966. A. 9, 19, 28.

The United States Court of Appeals for the First Circuit heard argument of the cases on September 11, 1967, and on September 27, 1967, rendered its unanimous decision affirming the judgment of the District Court.[4] A. 192-195.

On December 21, 1967 Petitioner filed its Petition for Certiorari with this Court. Respondents on January 20, 1968, filed their Brief in Opposition to the Petition for Certiorari. On February 16, 1968, Petitioner filed a Reply Brief, and on March 11, 1968, the Petition for Certiorari was granted. On April 5, 1968, Respondents filed their Petition for Rehearing, and on April 22, 1968, the Petition for Rehearing was denied.

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[3]This decision is not reported.

[4]Decision reported, *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 382 F.2d 1010 (1967).

2. Statement of Facts

a. *The Parties and their Contracts*

Respondent, A. C. Samford Overseas, Inc., a Georgia corporation (A. 40), was the general contractor for the construction of the following five large building projects in Puerto Rico, which are involved in this appeal:

1. Aguadilla Housing Project in Aguadilla, Puerto Rico, under contract dated May 18, 1960, with the Puerto Rico Urban Renewal and Housing Corporation;
2. Dr. I. Gonzalez Martinez Oncologic Hospital under contract dated December 4, 1959, with the Board of Trustees of the Puerto Rican League Against Cancer;
3. The Central Power Plant & Laundry in Rio Piedras, Puerto Rico, under contract dated August 18, 1960, with the Provisional Board of the Puerto Rico Medical Center;
4. The Rehabilitation Center in Rio Piedras, Puerto Rico, under contract dated November 23, 1960, with the Provisional Board of Puerto Rico Medical Center; and
5. The Wherry Housing Modification and Improvement at Ramey Air Force Base in Puerto Rico under contract dated November 23, 1960, with the United States of America. A. 30-31, 41.

The amounts of these contract prices totalled over $9,000,000.00. Samford also was performing other construction contracts in Puerto Rico. R. I, 1 (4).

During 1960 and 1961 Petitioner, Commonwealth Coatings Corporation, a Puerto Rico corporation specializing in painting on construction projects in Puerto

Rico (A. 40), and Respondent Samford entered into five subcontracts under which Petitioner was to perform all of the painting work on the above five projects. The total of the subcontract prices was $351,938.00. A. 33. Petitioner's performance of the subcontracts was bonded by Maryland Casualty Company. A. 68. Two of the three principal owners of Petitioner, Mr. Stein and Mr. Marcus, were from New York. A. 94. Petitioner was also performing other painting work for Samford and others in Puerto Rico. R. I, 1 (4).

Petitioner commenced the painting work on the projects; however, disputes arose between the parties concerning performance of contractual obligations. Samford claimed that Petitioner had breached the subcontracts to the damage of Samford by Petitioner's failure to perform timely and correctly all of its duties under the subcontracts. A. 31, 72. Petitioner fell behind in the required completion schedule, began to make major errors in performance, such as painting buildings with the wrong paint, began to omit certain required work, failed to provide sufficient workmen, failed to pay for paint and supplies as required, and finally, instead of continuing performance and arbitrating any disputes it had with Samford, as required under the arbitration clause in each subcontract,[5] during June and July, 1962, Peti-

[5]Each of the subcontracts contained the following arbitration clause: "If any question of fact shall arise under this contract, either party hereto may demand an arbitration by reference to a Board of Arbitration, to consist of one person selected by Contractor, and one person selected by Sub-contractor, these two to select a third, and in case these two fail to select a third within three days, he shall be named by the Architect or his authorized representative. In case either Contractor or Sub-contractor fails

tioner completely abandoned the painting work on all five projects. A. 31, 69. Pursuant to the default provisions of the subcontracts, Samford terminated the subcontracts and was required to complete the painting work of Petitioner at great extra cost to Samford. A. 31, 71-72. Petitioner had been paid $209,502.49 under the subcontracts before abandoning all of its work on the five projects. A. 33-34.

Immediately following the walk-off by Petitioner and the termination of the subcontracts, arbitration was demanded by Samford pursuant to the arbitration clauses of the subcontracts as a means of resolving the disputes. A. 31, 57-58, 69-70. Petitioner then also demanded arbitration, and the parties started selecting arbitrators. A. 47. Samford selected Dwight L. Chapman as its arbitrator. A. 32. Petitioner designated Pedro Pons, who later resigned or refused to serve.

b. *The Commencement of Litigation; the Arbitrators*

Rather than commence the arbitration proceedings,

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to name an arbitrator within three days after requested to do so, the Architect, or his authorized representatives, shall name an arbitrator to represent the party so failing to name one. The written decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expenses of such reference. Arbitration of a demand or decisions by the Architect or Owner shall be made within 5 days following notification to Sub-contractor of such demand or decision, otherwise Sub-contractor shall be bound thereby, unless the Owner shall agree to arbitration after that period. Provided, nothing contained herein shall excuse Sub-contractor from completion of the work in the manner provided in this contract nor shall the pendency of any dispute or arbitration proceeding excuse any delay, deficiency, default, or noncompliance therewith." A. 46-47.

however, Petitioner brought, in the District Court of Puerto Rico, Civil Actions Nos. 441-62 and 442-62 against Respondents, Continental Casualty Company and Fireman's Fund Insurance Company, the construction sureties for Samford on the performance and payment bonds furnished on the various projects. R. I, ¶ (2); II, 50 (2, 4, 6, 8). The sureties filed motions to stay the actions under the Federal Arbitration Act and the Arbitration Act of Puerto Rico to await the outcome of the arbitration proceedings. A. 3, 13. Each side filed two briefs (R. XVI, 149, 150, 152, 153), two briefs on behalf of Petitioner were filed by its former attorney, Robert H. Ruskin, as amicus curiae (R. XVI, 151, 154) a hearing was had, and the District Court stayed the actions by its order of March 12, 1963.[6] A. 3, 13.

Following the stay order, Petitioner selected as its arbitrator a Puerto Rico attorney by the name of Holman. A. 145. Samford's arbitrator who had earlier been selected, Mr. Chapman, and Mr. Holman named as the third arbitrator Jose L. Capacete. A. 66, 145. Before hearings could be commenced, however, Mr. Holman died. A. 66, 145. Petitioner then selected as its arbitrator to fill the vacancy, Hector Martinez Munoz. A. 66, 145-146. Samford had consented to this procedure for the filling of the vacancy on the board in lieu of applying to the District Court for appointment of an arbitrator. *Infra*, at 56-62.

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[6]See Note 2, *supra*.

Highly Qualified and Respected Professionals Served as Arbitrators

Hardly a more well-qualified board of arbitrators could have been selected to arbitrate a construction dispute. Mr. Chapman was a graduate engineer with 30 years of service for the Corps of Engineers as a civilian engineer, acting principally in the capacity of contracting officer on government construction projects. A. 104-105. Upon retirement Mr. Chapman had made his permanent home in Puerto Rico where he had previously performed much of his services with the Corps of Engineers and began a private engineering consulting business in which he was well known and respected. R. III, 116 (4-5).

Mr. Martinez was a well-known San Juan attorney and incidentally a professional colleague and friend of the attorney for Petitioner, Carlos Romero Barcelo. A. 66.

Mr. Capacete was one of the most eminent professional consulting engineers in Puerto Rico; he was a professor of engineering at the University of Puerto Rico and majority owner and an officer of Foundation Engineering Company of Puerto Rico and a member of the architectural firm, Capacete, Martin & Gutierrez. A. 66, 81, 141-142. The history of Foundation Engineering Company amply reveals its importance in the field: Foundation Engineering Company prior to 1957 was the only engineering consulting firm in Puerto Rico performing such consulting services; between 1957 and 1959 there were only two such companies in Puerto Rico and up to 1959 and 1960 Foundation Engineering Company was the larger of the two companies; after 1959, there were three firms performing such engineering con-

sulting services in Puerto Rico, one other of which performed approximately the same amount of business as Foundation Engineering Company. A. 141-142.

c. *The Arbitration Proceedings*

Upon the issuance by the District Court of the stay of the actions, the arbitration commenced on August 14, 1963. A. 3, 13, 63. At the request of the arbitrators each side presented a statement of issues. A. 108-109. At the opening of the arbitration proceedings, the parties mutually agreed that all questions of fact and law regarding the disputes between the parties would be submitted to the arbitrators for decision. A. 32-33. Prior to the hearings Petitioner had served interrogatories on Samford and answers were duly provided by Samford. A. 98.

The hearings lasted for a total of approximately ten days, and an estimated 90 hours of testimony were taken. A. 92. The first session of the hearings continued until August 18 when the hearings were suspended to August 30; the hearings were then resumed and were finally concluded on September 3, 1963. A. 63. Samford contended that Petitioner had breached the subcontracts by not performing its obligations under the subcontracts, by performing poorly (painting buildings the wrong color, failing to paint in the more difficult areas, such as behind shrubbery, etc.), falling behind schedule, not manning the projects with sufficient forces, omitting required work, failing to pay its suppliers in a timely fashion as required by the subcontracts, making representations to Samford that payment to suppliers had been made when such payment had not in fact been made, and finally completely defaulting by abandoning the

painting work on all five projects. A. 31, 72; R. III, 116 (2). Petitioner claimed that Samford did not make progress payments as they allegedly became due. A. 31, 43. However, Petitioner had been paid $209,502.49. A. 33-34. Further Petitioner's gross default and deficient performance also caused Petitioner to be due no further payment.

Both parties were represented by counsel. Petitioner was ably represented by Robert H. Ruskin, a Harvard Law graduate, who practiced in Puerto Rico, and Carlos Romero Barcelo of San Juan, a graduate of Yale University and the University of Puerto Rico Law School, and Max E. Greenberg of New York City, a well-known attorney and recognized expert in the area of construction law. A. 97. Subsequently in the proceedings and trial in the District Court, Petitioner was also represented by Alvin L. Korngold of the New York Bar. A. 75, 87. Samford was represented by Federico Ramirez Ros of San Juan and Overton A. Currie and Edward H. Wasson, Jr. of Atlanta, Georgia.

The hearings were conducted much in the nature of a trial. Petitioner had propounded pre-trial interrogatories to Samford which had been answered. During the trial the moving party, Petitioner, presented its evidence first, followed by cross-examination by Samford. Samford then presented its evidence followed by cross-examination by Petitioner. Counsel for both parties made oral summations of their cases on the last day of the hearings. The arbitrators in the course of the hearings ruled on various procedural matters including the admissibility of various types of evidence offered by the parties and generally adhered to those rules of evidence followed by the courts on the admissibility of evidence. R. III, 116 (7).

Few objections were made by either party during the hearings to any of the procedural decisions made by the arbitrators. No objections were renewed at the end of the hearings. No motions were made by either party at the conclusion of the hearings to allow further evidence, cross examination or arguments. A. 93-94; R. III, 116 (8).

Hundreds of documents were offered in evidence by the parties in support of their positions. The oral hearings, which had been recorded by court reporters on magnetic tapes, lasted for such a length of time that to type the entire record became excessively expensive, and the parties determined that the best alternative would be to have the tapes recording the hearings preserved by the court reporters, Crespo & Rodriguez of San Juan, for future use. R. III, 116 (8). Since the hearings several portions of the tapes were transcribed, and these transcripts[7] were filed with the District Court at its request. A. 27; 170, 174.

Following the oral hearings, both sides filed extensive briefs with the arbitrators. On September 16, 1963, Samford filed its brief with the arbitrators, totalling 105 pages. Upon receiving the briefs of the opposing party, each party filed a reply brief, Samford's being filed on October 8, 1963, and Petitioner's on October 17, 1963, Mr. Romero also wrote letters to the Board on October 4 and November 13, 1963, concerning further aspects of the case. R. III, 116 (9).

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[7]These transcripts are on file with the Clerk of the Supreme Court as part of the record below.

On November 12, 1963, the arbitrators issued their unanimous, formal written award in favor of Samford by rejecting Petitioner's claim and allowing part of Samford's claim. A. 30-35. The award determined that Petitioner had wrongfully abandoned its work on the five projects without contractual right and, pursuant to the authority granted by the subcontracts, Samford properly terminated Petitioner as a subcontractor and completed its work. A. 34. Samford had claimed total costs of completion of Petitioner's work in the amount of $244,025.00, which sum included Samford's extended overhead and administrative costs. A. 72. Of the amount claimed, the arbitrators determined that the reasonable cost to Samford for completing this work was $158,307.86. A. 34. After subtracting the total unpaid subcontract balance of $142,435.51 from this $158,307.86 as provided in the default provisions of the subcontracts, the Board determined that Petitioner was indebted to Samford in the amount of $15,872.35, discharging Samford from any and all liability to Petitioner. A. 34.

It is most important that following the commencement of Civil Action No. 65-64, by Petitioner on February 7, 1964, challenging the arbitration award on the ground, among others, that the arbitration award should be vacated by reason of the alleged partiality of Mr. Capacete, Petitioner admitted and ratified the Board's capacity, competency and qualifications by expressly seeking relief from the Board itself by filing a petition on March 10, 1964, for review of the award. Samford filed two briefs responding to this petition on March 18, and August 1, 1964. The arbitrators took no further action in the matter following the award of November 12, 1963. R. III, 116 (11).

d. *The Challenges of the Award*

Following issuance of the award, Petitioner made a number of challenges of the validity of the award (A. 184), only one of which is before this Court, that being the allegation that certain previous business relations between Samford and Foundation Engineering Company of Puerto Rico constituted proof of "evident partiality" of one of the arbitrators, Mr. Capacete, under the Federal Arbitration Act, 9 U.S.C.A. §10 (b). Br. of Pet. at 3.

However, two of the other challenges are noteworthy. Petitioner sought to have the award set aside because hearings were held on two Sundays and on Labor Day, September 2, 1963 (A. 39, 52, 56), although the days hearings were held were decided upon by express consent and agreement of both parties and the arbitrators. (A. 67-68, 90). Secondly, Petitioner claimed that because the written award was rendered more than thirty days following the close of hearings, the award was void under Puerto Rican law (A. 39, 52, 56) although Mr. Romero, counsel for Petitioner, in the presence of the officer and owners of Petitioner's corporation, on the last day of hearings expressly agreed that the arbitrators would not be required to render this award within thirty days and stated that a waiver of the thirty day time limit made in open arbitration hearings was not required to be in writing in this case (A. 66-67, 94-95). Even though the arbitrators and all parties relied on this statement and these matters were agreed to at the time, and even though the reply brief of Petitioner to the arbitrators and two letters of Mr. Romero to the arbitrators were filed with the arbitrators after the thirty day period had allegedly expired (A. 95; R. III, 116 (9-10), Petitioner sought to use these arguments to set aside the award.

Mr. Capacete

As the prominent member of the Foundation Engineering Company, the sole such engineering consulting firm in Puerto Rico for many years and continuing as one of the two, and subsequently three, such firms in later years, as a lecturer and professor of engineering at the University of Puerto Rico, and as a member of a leading architectural firm, Mr. Capacete was probably the best known, most qualified, highly respected and the leading consulting engineer in Puerto Rico. A. 65-66, 142; R. III, 116 (5). Even the District Court in commenting to Mr. Romero, counsel for Petitioner, stated,

> "I know Mr. Capacete pretty well and I know his caliber as an engineer and as a man of science, there is no doubt." A. 80.

In choosing the third arbitrator, it was a natural decision for the engineer, Mr. Chapman, and the attorney, Mr. Holman, to select such an outstanding and recognized expert as Mr. Capacete. No allegation has been made, nor does the record in any way suggest, that Respondents attempted in any way to influence the selection of the third arbitrator.

Mr. Capacete was never the employee or agent of Samford. Mr. Capacete testified that he owned 67% of Foundation Engineering Company of Puerto Rico. A. 141. It was this corporation that, as an independent contractor, provided the unrelated and occasional testing services for Samford. Samford has always stated, when asked, that prior to the dispute between the parties and the arbitration proceedings, Foundation Engineering Company had, a year or more before the arbitration, performed certain routine testing services on isolated oc-

casions for Samford. A. 139. Samford was engaged in a major amount of construction in Puerto Rico, the five prime contracts of Samford involved in this dispute totaling over $9,000,000.00. A. 30-31, 41. Other construction was also being performed by A. C. Samford Overseas, Inc., a Georgia Corporation, in Puerto Rico and by A. C. Samford Virgin Islands, Inc., a separate and independent Virgin Islands Corporation, in the Virgin Islands. A. 136; R., I, 1 (4); III, 116 (3). To use Foundation Engineering Company for customary and routine construction testing and laboratory services pertaining to this construction was virtually a foregone conclusion. As Mr. Capacete testified, *"I would say I have business relations with most of the contractors in Puerto Rico."* A. 142.

The Petitioner's May 6, 1965 pleading attacking the award alleged:

> "During the years 1958 through 1962 he [Mr. Capacete] was employed by the defendant to render services for testing, for concrete steel and compaction, for the preparation of borings and other services in connection with the Oncologic Hospital, the Aguadilla Housing Project and the Power Plant for which he received fees from the defendant in the sums of $1,800.00, $2,500.00 and $3,000.00 respectively. In addition, he was also employed by the defendant in connection with a project at the Saint Croix Air-Sea Hospital [*sic*-Hotel] and the Saint Croix V.I. quarry investigation for which he received a fee of $12,000.00 from the defendant." A. 59.

Petitioner's attorney, Mr. Romero, at the July 16, 1965 hearing, in discussing this allegation, judicially admitted ". . . *we don't mean to say that we believe that*

the chairman acted improperly in any way . . ." (A. 75) (emphasis added), but contended that Samford had a business relationship on three projects involved in the arbitration ". . . which were the Hospital, the Medical Center, the soil tests and borings, he had received $1,800. In the Aguadilla Housing, another project, soil testing, etc., he had received $2,500. For the power plant and laundry building of the Medical Center, another project, he had received $3,000. . . . He had also done work in a St. Croix hotel for $12,000. *All this, it is true, had been prior to this claim . . .*" (A. 75-76) (emphasis added).

Thus, both the Petitioner's pleadings and opening statement clearly admit and stipulate the following:

(1) The nature of the services were soil tests, borings, and quarry investigations.

(2) Petitioner does not even allege or suggest that these services in any way related to painting or the Petitioner's work or disputes decided by the arbitration.

(3) The vast majority of such services and payments involved quarry investigation and soil testing and borings on projects that were not involved in the arbitration and not even located in Puerto Rico, but rather on the Island of St. Croix, Virgin Islands, in connection with the St. Croix Ait-Sea Hotel and the St. Croix, Virgin Islands, quarry for which an alleged fee of $12,000.00 was paid. A. 59, 76.

(4) The Petitioner expressly admitted that these unrelated business relations had occurred as long as five years before (1958) to a year (1962) before the arbitration (1963) and all business relations had been terminated before the arbitration, when Mr. Romero

stated: *"All this, it is true, had been prior to this claim. . . ."* A. 76. (Emphasis added.)

The evidence and the record, as hereinafter next discussed, amplify and correct these general allegations of Petitioner and conclusively establish that Mr. Capacete was fully qualified and competent to serve as an arbitrator and that all of his relationships with Samford had been remote, insubstantial, casual and had completely terminated a year or more before the arbitration.

Some of the services of Mr. Capacete's firm about which Petitioner has complained were performed not for Samford, but for architects prior to construction. Petitioner as a large painting contractor had full knowledge that Respondent bid on these public projects after the various owners' architects had designed them and that the work performed by Mr. Capacete's firm for these architects prior to construction was in no way a business relationship between Mr. Capacete's firm and Samford. Petitioner's allegations regarding services on "Oncologic Hospital, on the Aguadilla Housing Project and the Power Plant" and payments of "$1,800.00, $2,500.00 and $3,000.00 respectively" were unwarranted and incorrect. Mr. Capacete testified:

> ". . . In several of these jobs, like the Aguadilla Housing Project and the oncological hospital, I believe the power plant, *I did some work for the architects* which indirectly was on the project where Samford's work was being carried on, but also I did some testing work for Samford after construction started. *The work for the architects was prior to construction."* A. 136. (Emphasis added.)

The Respondent, A. C. Samford Overseas, Inc., over

a period of several years paid Mr. Capacete's firm, Foundation Engineering Company of Puerto Rico, a total of only some $2,000.00 to $4,000.00. The Virgin Islands work was a separate and unrelated operation. Indeed, A. C. Samford Virgin Islands, Inc. was a separate and independent corporation with its own general manager and operations in St. Croix, Virgin Islands. This Virgin Islands corporation was not a party or in any way involved in the arbitration. After excluding all fees paid Mr. Capacete's firm for Virgin Islands work, the record establishes that Mr. Capacete's firm during the several year period involved received fees of only some $2,000.00 to $4,000.00 from Respondent Samford. Mr. Capacete's testimony establishes this:

> "Q. Do you recall whether your company did any work in connection with these projects? A. Yes. We did in about two or three of those projects, we did some testing work.
>
> Q. Which had no relationship at all to the painting work? A. No.
>
> Q. Do you recall about how much money was involved in these services? A. In the order of three or four thousand dollars, *maybe two or three thousand dollars.* I don't recall the exact figure.
>
> Q. Was that work done for Samford or are you referring to work done prior to it? A. No, work done for A. C. Samford Company.
>
> Q. In these projects? A. Over a period of two years or so.
>
> Q. And all the work involved things different from the actual work of painting? A. Yes." A. 140. (Emphasis added.)

The record of the July 16, 1965 hearing further indi-

cates the minor and insubstantial nature of the work performed by Mr. Capacete's firm. Counsel for Respondents stated,

> "... we believe we can establish that Commonwealth Coatings knew or should have known that Mr. Capacete had previously done some *minor work*. ...
>
> The factual portions of the statement made by Commonwealth [*sic*] attorney are denied. One, we assert that *there were several corporations involved* and he [Commonwealth's attorney] knew it, working in the Virgin Islands, in their pleadings, not the one [Respondent, A. C. Samford Overseas, Inc.] involved in this litigation. Secondly, the Samford party tendered to this Court proof that Mr. Capacete received from 1958 through 1962 or 1963 in some four or five year period, when I say Mr. Capacete I am referring to *his firm* for testing concrete pourings—
>
> The Court: I know what the business of Mr. Capacete is and I believe that he is the most competent man in that business in Puerto Rico.
>
> Mr. Currie: *He received something less than two or three thousand dollars in routine business of his, or his business received it, when his business had an annual gross of a million dollars.*" A. 81-82. (Emphasis added.)

Although Mr. Capacete's testimony establishes that he was a professional civil engineer (A. 135), all of the services and fees involved in the Petitioner's allegations were rendered by and paid to the Foundation Engineering Company of Puerto Rico (A. 136). Mr. Capacete's work was not in his "own personal capacity," but for the Foundation Engineering Company (A. 136) which, as an independent contractor, had provided all the testing and

other services described in the Petitioner's allegations and the record. Indeed, most of these services and fees involved not the work of Mr. Capacete, but the employees of the Foundation Engineering Company. Mr. Capacete testified:

> "A. I own 67% of the Company.
>
> Q. That's what we wanted to clarify. You own 67% of the company? A. Yes.
>
> Q. When you mentioned this work done by your company for the Samford organization, was this work the actual work actually performed by you? A. No, it was performed by my personnel.
>
> Q. Your personnel; in other words, this work didn't in general require your direct intervention? A. Let's say 10% of my direct intervention.
>
> Q. Only 10%? A. Yes." A. 141.

Nothing in the record justifies attributing to Respondent, A. C. Samford Overseas, Inc., the services performed for and paid by another and independent corporation, A. C. Samford Virgin Islands, Inc. To the contrary the record establishes that Mr. Capacete and his firm recognized that there were two separate companies and operations, for Mr. Capacete's testimony expressly recognized them as two rather than one company and operation, namely:

> "During the years 1957 or 1958 to 1961 or 1962 I did some work for Samford Company of Puerto Rico and the Samford Company of the Virgin Islands." A. 136.

The Respondents' attorney at the July 16, 1965 hearing, without contradiction or denial from the Petitioner or its attorney stated:

"One, we assert that there were several corporations involved and he [Commonwealth's attorney] knew it, working in the Virgin Islands, in their pleadings, not the one [Respondent, A. C. Samford Overseas, Inc.] involved in this litigation." A. 81.

The magnitude and multiple aspects of Mr. Capacete's professional work clearly demonstrate the insignificance and insubstantial nature of the testing services for Samford. Not only did Mr. Capacete serve on the faculty of the School of Engineering of the University of Puerto Rico but he was a principal in two corporations involved in engineering and construction. In the July 16, 1965 hearing Respondents' attorney, Mr. Ramirez, described this to the District Court:

"Mr. Capacete has two corporations dealing with the trade of engineering. He is president of Sacmac, the largest structural firm doing a gross income of over a million dollars. Also, president of Foundation Engineering dealing with testing of materials and up to 1960 it is my understanding there were only two companies dealing with this and Mr. Capacete's was the largest company. . . . If Mr. Capacete could not serve contractors who have at one time done business with his corporation, he couldn't act as an arbitrator. . . . Many contractors call the offices of Foundation Engineering to have a job done in terms of testing. . . ." R. V, 138 (17-18).

The testimony of Mr. Capacete further described the business of these companies. He stated that the Foundation Engineering Company had had an annual income during "those years" in question "in the order of $200,000.00" per year. A. 141. This company until 1957 was the only one providing such engineering and testing services in Puerto Rico, "Then until 1959 there were two. After 1959 there were three." A. 142. Foundation

Engineering was the biggest such firm until 1959 or 1960 since which time it has remained as large as any of the others. A. 142.

Mr. Capacete also testified he was an owner and officer in another company involved in the engineering-architectural field. The name of this firm is Capacete, Martin, & Gutierrez, but it is called "SACMAG." A. 142.

Thus it is obvious that Mr. Capacete was correct when he testified: *"I would say I have business relations with most of the contractors in Puerto Rico."* A. 142. (Emphasis added.)

The $200,000.00 per year annual income of the Foundation Engineering Company (A. 141) multiplied by the six year period involved, 1957 through 1962 equals $1,200,000.00. The total of $2,000 to $4,000 (A. 140) paid by Respondent Samford during this period to Mr. Capacete's firm thus equals less than 1/3 of 1% of the income of this firm.

Even if there are included the fees and work performed by Mr. Capacete's firm for A. C. Samford Virgin Islands, Inc. the grand total of all fees paid by all Samford's companies to Mr. Capacete's firm during this six year period was only ". . . in the order of $12,000.00." A. 139. Thus, the evidence and record reveal that even if there are included payments made by another independent corporation for the St. Croix, Virgin Islands, work, still Samford provided no more than 1% of the total business of Mr. Capacete's firm.

Again, even including work performed by Mr. Capacete's firm for the owners' architects for testing prior to construction and before Samford bid the jobs, there is at

most a grand total for all services rendered to all of Samford's companies and the unrelated architects of only the amounts alleged in Petitioner's May 6, 1965 pleadings (A. 59) namely: $1,800.00, $2,500.00 and $3,000.00 for Puerto Rico testing and $12,000.00 for St. Croix, Virgin Islands testing there is a total of only $19,300.00 during the six year period or only 1.6% of Mr. Capacete's firm's income. However, there is no justification for including and imputing to Respondent Samford fees not paid by Respondent Samford but by independent architects engaged by the owners of these projects and fees paid to the independent Samford corporation of the Virgin Islands.

When the $1,000,000.00 per year gross income of SACMAG is added to the other income of Mr. Capacete's business interests the above percentages are radically reduced and the insubstantial nature of the testing fees *paid Mr. Capacete's firm becomes obvious. For example,* multiply the SACMAG $1,000,000.00 income, not for six years, but only three years and there is an additional $3,000,000.00 in gross income to be added to the $1,200,000.00 gross income of the Foundation Company to produce a total of $4,200,000.00 in gross income for firms in which Mr. Capacete was interested as president and principal owner.

The total of $2,000 to $4,000 (A. 140) paid by Respondent Samford would thus equal less than 1/10 of 1% of this gross income of $4,200,000.00. The total of $12,000 for all Samford's companies' testing in both the Virgin Islands and Puerto Rico would equal less than 3/10 of 1%. Even the unjustified, incorrect, and exaggerated $19,300 total of the Petitioner (A. 59) equals less than

1/2 of 1%. The insignificant and insubstantial nature of the amount is self-attesting.

The uncontradicted testimony conclusively establishes that these testing services in no way involved painting or the issues and disputes in the arbitration. A. 136, 140. All of the services were rendered by Foundation Engineering Company and the company was paid for those services, not Mr. Capacete. A. 138. The fees paid Foundation Engineering Company were the normal and customary fees for such services. A. 65.

It is obvious that "drilling for foundation investigations" and "testing construction materials such as sand, gravel and concrete blocks and compaction of the soil" (A. 139) involved testing services related to site preparation prior to construction and the work on foundations, the first phase of construction, while it is equally obvious that painting is among the last of the construction activities since the walls, ceilings and doors must be installed and completed before they receive the paint and it is natural to delay the painting until the end to prevent scratching or damage. Since all five of the prime contracts involved in the arbitration were executed in 1959 and 1960 it is apparent that the testing work performed by Mr. Capacete's firm, because of its nature, was performed during the early portions of the work in 1959 and 1960. Petitioner's painting subcontracts were executed in 1960 and 1961. (A. 41) and the painting was still being performed on all of them at the time Petitioner wrongfully abandoned the work in June and July, 1962. This further establishes painting to be among the last phases of work to be performed on a construction project. Thus, both by nature of the work, as well as the time of performance, Mr. Capacete's services did not in any way re-

late to the painting and issues of the arbitration. Indeed, Petitioner's own attorney admitted to the court that all of the services, both in the Virgin Islands and Puerto Rico, performed by Mr. Capacete's firm, "had been prior to this claim" (A. 76) involved in the arbitration.

Thus, it is certain there was no relationship between the testing services of Mr. Capacete and the dispute and the arbitration. Also the record reveals that Mr. Capacete and his firm never performed any services for Samford or others on the Wherry Housing Modification and improvement contract at Ramey Air Force base which involved a painting subcontract with Petitioner for $230,750.00 (A. 41, 71) which was approximately 70% of the total dollar amount of all painting subcontracts involved in the arbitration. It is equally obvious that Mr. Capacete was never the agent or employee of any of the Samford companies but that his firm, as an independent contractor, more than a year before the arbitration, had provided occasional, remote, unrelated, isolated, insignificant and insubstantial routine testing services for which the Foundation Engineering Company was paid the customary fees, and even this testing work was performed by the employees of this company with only the minor and slight supervision of Mr. Capacete.

All of these facts explain the reasonableness of Mr. Capacete's answer to Mr. Romero.

> "Q. Did you have any reason to believe that this matter should be disclosed? A. No." A. 137.

No consulting or testing services were furnished by Mr. Capacete or any of his firms during the arbitration hearings, and in fact the last such services had been concluded at least a year or more before the arbitration. A.

139. Also, there was little or no likelihood of the need for further services since Samford had not contracted for major projects in Puerto Rico for some two or three years before the arbitration and was arranging to close its operations in Puerto Rico upon completion of its existing contracts. R. III, 116 (6).

The difference in the relationship of Mr. Capacete with Samford and with counsel for Petitioner is considerable and significant. Mr. Capacete testified that he had met A. C. Samford, Jr., the President of A. C. Samford Overseas, Inc., only, "about 4 or 5 times." A. 135. On the other hand, Mr. Capacete testified that at the time of the arbitration hearings he knew Mr. Romero, counsel for Petitioner, "very well"; that he was "a very old friend of his [Mr. Romero's] father," who was one of the "highest esteemed engineers on this island"; and that Mr. Romero and he were fellow members of the Rotary Club. A. 146. He summarized his relationship with Mr. Romero as, "I know him well, I would say, as a good friend of mine." A. 146. Mr. Capacete further testified that Mr. Romero was acquainted with his position in the field of engineering and with his activities, and that "he was acquainted that he knew my type of business, that I was a consulting engineer in foundations and in testing." A. 146.

The "Investigation" by Mr. Romero

The long history of this litigation, the undisputed testimony given at the trial, the record and all of the briefs[8] and other pleadings of the parties filed in these

[8]Petitioner for the first time in the litigation argued in its Reply Brief in support of the granting of certiorari that it made inquiry of Respondents and/or Mr. Capacete.

actions clearly show, definitely and without question, that Petitioner never made inquiry of Mr. Capacete or any of the Respondents or their counsel prior to the issuance of the award concerning whether there had ever been business relations, directly or indirectly, between Mr. Capacete and any of Respondents, including Samford. See, *infra* at 42-62. In short, Petitioner *never asked* any of the interested parties about such business relations or any other aspect of Mr. Capacete's qualifications or relationships. The only proof at the trial was that, although the above-described close relationship and friendship existed between Mr. Romero and Mr. Capacete, Mr. Capacete testified Mr. Romero never asked him whether he had performed work for or had had commercial relations with any of the parties to the arbitration (A. 146), even though Mr. Romero had consulted with Mr. Capacete about whom to select as a replacement for Mr. Holman (A. 145).

It is equally clear and certain that neither Mr. Capacete nor Respondents or their attorneys ever made representations of any sort that such business relations as did exist, though they were remote, casual and insubstantial, had not in fact occurred. Although Petitioner misleadingly and prejudicially argues that such information was "concealed," there is no evidence whatsoever — not even a scintilla — even suggesting such a serious charge, much less is there any *proof* of any "concealment." There is likewise no suggestion or evidence of any misrepresentation. Whatever Mr. Romero's "investigation" was, it did not include asking the simple question of Mr. Capacete or of Respondents or of their counsel. See, *infra* at 42-62. Even though Mr. Romero showed no hesitancy to testify in an effort to set the arbitration award aside, he at no

point even so much as suggests he made any inquiry of Mr. Capacete, Respondents, or of their counsel about Mr. Capacete or the other arbitrators. A. 148-153.

The Ultimate Issue at the Trial

The final hearing reflects a highly significant aspect about the challenges of the award by Petitioner. The issue at the trial as stated by Petitioner's attorney, Mr. Romero, and relied upon by the court and Samford, was not the alleged "partiality" of Mr. Capacete, but whether certain documents admitted into evidence in the arbitration proceedings were objected to by counsel for Petitioner. A. 147-183. Mr. Romero testified he objected (A. 149-150), but all three arbitrators testified otherwise (A. 119-120, 138, 159). To resolve this issue, the agreement was made, at the court's request, that each party would have those portions of the tapes of the hearings transcribed which it desired transcribed and submitted to the court, the costs of which were incidentally to be borne by Respondents. A. 174, 181-183.

In further rebuttal of Mr. Romero's testimony, Samford produced the court reporter and the tapes of the pertinent sessions. A. 163-178. When thus confronted, Mr. Romero himself twice called it "a matter of credibility" as to whether he had made the objections he testified to and stated Petitioner had "put forth a case that rests right now on credibiliy." A. 178.

The District Court several times indicated that if Mr. Romero's testimony was true that an objection was made, the court, or the parties by agreement, could resubmit the matter to the arbitrators providing an opportunity to Petitioner for rebuttal. A. 174-179. Mr. Ro-

mero's response to the suggestion of a resubmittal was only that he believed the arbitrators had expressed they "would feel very bad" about considering the case any further (A. 174), not that he had an objection to this same board hearing the matter again or that he challenged Mr. Capacete as being "partial" and therefore unqualified to hear the matter.

The transcript[9] was prepared and submitted to the District Court with briefs from both parties.[10] A. 27. The District Court found that no objection had been made by Petitioner, nor had Petitioner made any request for an extension of time to examine the documents or obtain additional testimony. A. 185.

It was therefore with some degree of surprise that, after such reliance and stress by Petitioner on the issue of admissibility of certain evidence virtually to the exclusion of other issues at trial, Respondents learned that Petitioner's appeal was based on the alleged "partiality" of Mr. Capacete. Obviously Petitioner's attorney realized it had no case unless it could establish abuse of fair play or procedural due process, and relied on his own testimony to make the whole case an issue of credibility. But the three arbitrators, including Petitioner's own arbitrator, a lawyer and a friend of Petitioner's attorney, testified there had been fair and lawful proceedings — and the court reporter's tapes and transcripts later confirmed that Petitioner's attorney's testimony before the District Court given in an attempt to overturn the award,

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[9]R. VI, 139.

[10]R. XVI, 159 (Br. of Samford); R. XVI, 160 (Br. of Petitioner). Copies of these briefs and all other briefs filed in the District Court have been certified by the Clerk of the District Court and filed with the Clerk of the Supreme Court.

was not correct, but contrary to the facts. This serious discrediting and the loss of Petitioner's attorney's own stated proposition to the District Court – "it's a matter of credibility" (A. 178) –is most relevant in evaluating the vague, indefinite and puzzling affidavit made and filed earlier by Petitioner's same attorney for the same purpose – to use in an attempt to overturn the award.

ARGUMENT

1. Summary of Argument

Petitioner attacks the arbitration award rendered in the arbitration proceedings by the unanimous decision of the board of three arbitrators resolving all disputes of law and fact between Petitioner and Respondent Samford on the ground that the Chairman of the Board of Arbitration, Mr. Jose L. Capacete, was allegedly guilty of "evident partiality" within the meaning of §10 (b) of the Federal Arbitration Act, 9 U.S.C.A. §§1-14, for the reason that there had been certain past business relationships between the firm with which Mr. Capacete was associated, Foundation Engineering Company of Puerto Rico, Inc. and Respondent Samford prior to the arbitration proceedings. This challenge of the award is entirely unfounded and without merit, and the award should be confirmed for the following reasons:

(1) The business relationships between Foundation Engineering Company and Respondent Samford were remote, casual, insignificant, and isolated and had been concluded and terminated a year or more before the arbitration proceedings. The work performed consisted of professional engineering consulting testing services for Samford as a major contractor in Puerto Rico, and did not in any way pertain to Petitioner or the painting work of Petitioner. The amount paid Foundation Engineering Company by Respondent Samford was totally insignificant and nominal in amount, and was the normal and customary professional fee for such services. Foundation Engineering Company was only a part of Mr. Capacete's business interests as a professional engi-

neer, and Mr. Capacete personally had little to do with the services performed.

(2) Petitioner admits that there was no actual partiality or bias on the part of Mr. Capacete and that Mr. Capacete did not act improperly in any respect, and Petitioner thereby admits that there was no actual effect on the award by reason of such past business relationships.

(3) The arbitration proceedings were, in fact, fair and impartial and were expressly so found to be by the District Court and the Court of Appeals.

(4) Although Petitioner incorrectly argues that there was "concealment" and on occasion has intimated that some "investigation" was made by Petitioner's counsel, there is absolutely no shred of evidence or implication in the record or elsewhere that any misrepresentation was ever made by Mr. Capacete, Respondents or their counsel or that these persons acted in any fashion other than in total good faith with Petitioner and Petitioner's counsel. These conclusions are reflected in and are supported by the testimony and the evidence, the pleadings of the parties, the admissions of counsel for Petitioner in argument before the District Court, the failure of Petitioner to plead and prove facts relevant to such contentions, and the absence of any such statements or implications in the affidavit of counsel for Petitioner so heavily relied upon by Petitioner.

(5) The federal and state case authorities pertaining to validity of arbitration awards reflect the strong and pervading policy in favor of the finality of awards and stress that arbitration is in informal, contractual remedy which should remain unfettered by the technical re-

quirements and rules pertaining to litigation and which often cause litigation to be a less satisfactory remedy.

(6) The great weight of authority is to the effect that arbitration awards are to be upheld and confirmed unless there is present actual partiality of an arbitrator or such substantial, close, and important relationships exist between a party and an arbitrator that actual partiality is presumed to be present and to have had an effect on the hearings and the award; it is admitted by Petitioner that Mr. Capacete was not actually partial, and the facts reflect that no significant close, and important business relationship existed.

(7) Although Petitioner argues to the contrary, the authorities reveal that there is no duty on the part of an arbitrator or a party to volunteer information about previous business relationships unless there is an express contractual duty to do so or, by reference, rules have been incorporated to that effect such as the rules of the American Arbitration Association; there is no such contractual duty or incorporation of arbitration rules in the case at bar.

(8) The case authorities reveal that it is incumbent upon an objecting party to make reasonable and prudent inquiry if the party is to be entitled to raise objections as to business relationships, and no such inquiry was ever made by Petitioner of Mr. Capacete, Respondents or their counsel.

(9) The legislative history of the Federal Arbitration Act reveals that the purposes of the Act were to make arbitration enforceable as a matter of contract and to avoid thereby the delays, the technicalities and the expense of prolonged litigation and to arrive at re-

sults more suitable to the business world than was often found in judicial determination of business and commercial disputes, and that to enforce such a policy, including avoidance of delays by use of the appeals process, awards should be confirmed unless there is found to be an "inherently vicious" departure from what is moral.

(10) Even if it is determined that the previous business relations which occurred between Foundation Engineering Company and Respondent Samford could have have possibly been disqualifying relationships, Petitioner waived any right to object to such relationships because it either had actual knowledge or constructive knowledge of such relationship by knowledge of the business and reputation of Mr. Capacete in Puerto Rico, the substantial nature of the construction work being performed by Samford in the small area of Puerto Rico, and the related nature of the respective businesses, especially in view of the fact that Petitioner's counsel and Mr. Capacete were close personal friends, continually in communication prior to and during the arbitration proceedings.

(11) Public policy demands that the award be confirmed to strengthen arbitration as a practical contractual remedy without procedural pitfalls as would be created if any other disposition of the case is made.

(12) The rules of disqualification of judges and jurors reveal that such persons would not be disqualified under the facts of this case, and moreover, always with regard to jurors and often with regard to judges, it is incumbent upon the objecting party to make relevant inquiry to learn of such facts or otherwise the objection shall be considered waived.

(13) To vacate the award, either on the ground that past, remote and unrelated business relations will per se invalidate an award or upon a review of the facts it is found, as a matter of law, that evident partiality was present, would destroy confidence in arbitration as a remedy and end the usefulness of arbitration as a viable means of resolution of disputes, encouraging losing parties to seek to find such past and unrelated relationships after awards have been rendered, rather than to make reasonable inquiry prior to such proceedings, and to seek to overturn the proceedings on the basis of any relationship of whatever significance found to exist, and thus thereby merely add another step, of useless value, to the litigation process rather than avoid litigation.

2. Petitioner has failed to show "Evident Partiality" of Mr. Capacete under the Federal Arbitration Act.

Petitioner has based its appeal on the argument that there was "evident partiality" on the part of Mr. Capacete under the Federal Arbitration Act, 9 U.S.C.A. §10 (b). The District Court and the Court of Appeals held there had been no showing of "evident partiality" by Petitioner. A. 184-187, 192-195. Respondents respectfully submit that these holdings of the District Court and Court of Appeals are manifestly correct.

Although Petitioner has not raised the argument in its brief that the Arbitration Act of Puerto Rico, 32 L.P.R.A. §3222 (b), may apply as it did in its brief to the Court of Appeals[11] (at p. 12-13), the corresponding term under the Puerto Rican statute, "evident bias," does not appear to be a materially different standard.

a. *Petitioner's argument that there is an absolute duty to volunteer unsolicited information concerning previous relationships between an arbitrator and a party is without factual or legal foundation.*

(1) *Petitioner admits that Mr. Capacete was not actually partial or biased in any respect.*

Petitioner does not allege and has not attempted to show that Mr. Capacete was actually biased or partial or that the award was fraudulent in any respect. On the contrary, Petitioner has on numerous occasions admitted

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[11]Copies of this brief and all other briefs filed in the Court of Appeals have been certified by the Clerk of the Court of Appeals and filed with the Clerk of the Supreme Court.

that it does not challenge the honesty or integrity of Mr. Capacete or claim that Mr. Capacete acted improperly in any way.

In the first hearing before the District Court on the challenges to the award, held June 25, 1965, Mr. Romero, Puerto Rican counsel for Petitioner, stated,

> ". . . this isn't an allegation of fraud against the arbitrators. . . ."R. IV, 137 (2).

Mr. Korngold, New York counsel for Petitioner, then added unequivocally,

> "I would like the record clear that at no time is Mr. Romero or myself accusing any of the arbitrators with doing anything fraudulent." R. IV, 137 (2).

At the second hearing before the District Court on July 16, 1965, on the motions of Petitioner to set aside the arbitration award, Mr. Romero, attorney for Petitioner, stated,

> "Now, we don't mean to say that we believe that the chairman acted improperly in any way. . . ." A. 75.

The District Court summarized the position of Petitioner by stating,

> "I know Mr. Capacete pretty well and I know his caliber as an engineer and as a man of science, there is no doubt. And I believe that nobody here is trying to raise any reflection whatsoever on the ability, honesty and integrity of Mr. Capacete . . ." (A. 80),

to which Mr. Romero for Petitioner responded,

> "That's our position and we have so stated numerous times" (A. 81).

At the third hearing before the District Court on

February 14, 1966, on the motions of Petitioner to set aside the award, Mr. Romero for Petitioner admitted that it was making no challenge of the integrity of Mr. Capacete and, in fact, the Court was assured of Mr. Capacete's honor,

> "We want to make it known that we are in no way attacking the arbitrator's integrity. We believe him to be an honorable man" (A. 88).

to which the Court responded,

> "I believe you have said that all the time that you have come in here" (A. 88).

Mr. Romero, on direct examination by his associate counsel representing Petitioner, in answer to the question whether he would have objected had he known of the previous business relationship between Samford and Foundation Engineering Company, answered in part,

> "I don't think I would have objected because I know Mr. Capacete. . . ." A. 151.

The District Court and the Court of Appeals Found the Arbitration Fair and Impartial

On the basis of these admissions and upon consideration of all the evidence presented at the hearings and the arguments of the parties, the District Court held,

> ". . . *counsel for plaintiff disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved.* He seeks to overthrow the award on the ground that Samford should have informed plaintiff that the engineering firm with which the arbitrator involved was connected had in the past done work for Samford. In view of the fact that, not only has plaintiff failed to offer any evidence showing 'evident partiality' in said arbitrator (9 U.S.C. §10 (b)), *it also has expressly disclaimed any*

> *such imputation,* this objection to the award must be, and is hereby overruled. [Authority cited]." A. 185. (Emphasis added.)

After hearing all three arbitrators testify, after examining evidence admitted in the arbitration and listening to and reading portions of the testimony and proceedings tape recorded at the arbitration, the District Court found the hearings to be fair and commented on the arguments presented by Petitioner,

> "In closing, I wish to state that the record shows that *the arbitrators conducted fair, impartial hearings;* that they reached a *proper determination of the issues before them,* and that plaintiff's objections represent a 'situation where the losing party to an arbitration is now clutching at straws in an attempt to avoid the results of the arbitration to which it became a party.' [Authority cited]." A. 185-186. (Emphasis added.)

The Court of Appeals held that "the [District] Court was well warranted in finding that there was no prejudice or bias manifested in the course of the proceedings. Indeed, there was considerable evidence which negatived it." 382 F.2d 1010, 1012; A. 194.

On certiorari Petitioner has apparently not altered its original position of not challenging the integrity of Mr. Capacete. In its Reply Brief to this Court for the first time Petitioner did attempt to argue that it made inquiry of *someone* among Mr. Capacete and Respondents, (Reply Br. of Pet., p. 1-2), but this argument has not been presented in Petitioner's brief on the merits, and in light of all the admissions by Petitioner as to the integrity of Mr. Capacete, it can only be concluded that Petitioner does not intend at this point to reverse its original position as to the actual integrity and lack of any actual partiality on the part of Mr. Capacete.

In summary, it can be said on the basis of the admissions by Petitioner of Mr. Capacete's integrity that Petitioner is not suggesting that Mr. Capacete had any wrongful motive of any sort, conscious or subconscious, or that Mr. Capacete had any effect on the outcome of the arbitration proceedings which would not have occurred had the previous business relationships complained of not existed. Petitioner, consequently, is not arguing that the decision of the arbitrators has in any way been affected by the previous business relationship between Samford and Foundation Engineering Company.

(2) *Petitioner's attempt to impute bad faith to Mr. Capacete or Respondents or to show that inquiry was made is completely without foundation and is entirely refuted by the facts of the case.*

It is difficult for Respondents to ascertain definitely just what Petitioner's position is now with respect to the allegation made in the Reply Brief to this Court that Petitioner made inquiry of Respondents or their counsel, if not Mr. Capacete, concerning previous business relationships, because this argument, which one would assume to be important if there were any basis in fact, is not apparently presented in the brief of Petitioner on the merits. However, apparently Petitioner is at least attempting to impute some degree of bad faith to Respondents, and perhaps Mr. Capacete, if not actually alleging that some misrepresentation was made as to previous business relations upon inquiry by Petitioner, by continuing to argue that such relations were "concealed" from Petitioner. Br. of Pet., p. 13, 15. If this is intended to imply some act was done with a view toward preventing Petitioner from learning of such past and remote relations, it is misleading, incorrect, and an unwarranted, prejudicial description of Petitioner's

own failure to inquire of Mr. Capacete, Respondents or their counsel about Mr. Capacete or any of the arbitrators. Neither actual misrepresentation nor any degree of bad faith on the part of either Mr. Capacete or Respondents or their attorneys is present anywhere in the case, and the clear and undisputed evidence shows that no such inquiry was made by Petitioner; equally important, the clear and undisputed record proves Mr. Capacete and Respondents and their attorneys at all times conducted themselves truthfully, fairly, and properly toward Petitioner; these facts are established conclusively, as follows:

The Testimony and the Evidence

No testimony or other evidence in the record reflects any claim of or the existence of any inquiry of Mr. Capacete or Respondents or their counsel, by Petitioner. A. 99-163. It is of great significance that although Mr. Romero, attorney for Petitioner, testified at the trial, he furnished no testimony even inferring or suggesting that he made any inquiry of Mr. Capacete, Respondents or their counsel concerning previous business relationships or otherwise. A. 148-153. To the contrary, the undisputed and only proof at the trial, by Mr. Capacete's own testimony, was that he was never asked by Mr. Romero whether he had ever had business relations with any of the parties to the arbitration. A. 146. Even though Mr. Romero examined Mr. Capacete at the trial, Mr. Romero did not seek to discredit, dispute, explain or overcome this testimony. A. 135-146. Petitioner simply furnished no proof at the trial to attempt to show there was ever any inquiry by Petitioner, prior to the arbitration, of Mr. Capacete, Respondents or their counsel as to the qualifications of Mr. Capacete or as to previous relation-

ships between Mr. Capacete and any of Respondents, a telling failure on Petitioner's part which can only reflect that no such inquiry was ever made.

It is certain that if such inquiry had been made, Petitioner's own witness and attorney who allegedly made the inquiry would have testified in detail regarding such inquiry.

The Petition and Motion of Petitioner in Civil Action 65-64

The pleadings of Petitioner constituting a part of the record in the District Court which were filed in challenge of the arbitration award do not contain any allegation or claim that inquiry was made. A. 36-61. The only allegations as to Mr. Capacete and previous business relations are found in the petition in Civil Action 65-64, filed February 7, 1964, and a subsequent motion and petition filed in that action on June 15, 1965, all of which are to the effect there was no "disclosure" of such relationship, but there is no allegation that any personal inquiry was ever made or that anything more occurred than that this information which had not been requested by Petitioner had not been volunteered by Mr. Capacete or Respondents or their counsel (A. 48, 55, 59), who did not know what Petitioner and Petitioner's counsel did or did not know. More importantly, under the facts of this case it would be unusual for Respondents not to have assumed Petitioner knew all it desired and certainly, if more was desired, Petitioner would make inquiry.

The Memorandum of Law of Petitioner filed in Civil Actions 441-62 & 442-62

The Memorandum of Law filed by Petitioner in the District Court in Civil Actions 441-62 and 442-62 on July 16, 1965, which is the only brief filed by Petitioner in the District Court on the issue of partiality clearly reveals that Petitioner did not allege that personal inquiry had been made of Mr. Capacete, Respondents or their counsel but that Petitioner was arguing that such information should have been *volunteered,* although this and other information was not solicited by Petitioner. R. XVI, 156.

In discussing the affidavit of Mr. Romero filed in Civil Action 65-64 on February 7, 1964, the only interpretation made by Petitioner is that the affidavit denies knowledge of any previous business relations; no interpretation, inference, or suggestion is advanced by Petitioner, that the affidavit shows Petitioner made inquiry of Mr. Capacete, Respondents or their counsel. R. XVI, 156 (11a).

In discussing the commercial arbitration rules of the American Arbitration Association in the Memorandum, Petitioner made the argument that the rules require a prospective arbitrator to volunteer information concerning any relationship with either of the parties or their counsel even though not asked by a party to do so. R. XVI, 156 (9). Stressing this argument shows Petitioner's position to be that there is a duty to voluntarily disclose relaionships *even absent inquiry about such or any other relationships* by the other party and although the rules of the American Arbitration Association do not apply in the case at bar.

Petitioner in its Memorandum to the District Court summarized its argument by saying that an arbitrator must conform to the "standard of Caesar's wife" (R. XVI, 156 (4)), that he not only must be actually free of any bias, but also "appear" to be free (R. XVI, 156 (11a)), and that Petitioner had a "right to know" of business relationships (*Ibid.*). No claim of inquiry or misrepresentation was ever made by Petitioner in its only written argument to the District Court on this issue.

Brief of Respondents to District Court on "partiality"—response by Petitioner

Respondents in their Brief to the District Court on certain challenges to the arbitration award filed in these actions on April 5, 1966, made the point, among others, with reference specifically to the allegation of partiality, that information concerning business relationships with Mr. Capacete had never been sought by Petitioner from Respondents prior to the arbitration proceedings. R. XVI, 159 (18-33) The brief specifically states:

> "Commonwealth [Petitioner] argues that Samford was required to "volunteer" all the information it knew of concerning business relationship with the arbitrators to Commonwealth Coatings, *even though such information was never solicited by Commonwealth.* . . . The duty is one of inquiry, not one of volunteering any and all information. *No one at any time withheld any information from Commonwealth.* . . ." R. XVI, 159 (24). (Emphasis added.)

Most significantly, no issue was taken by Petitioner in the District Court or the Court of Appeals to this statement of the true facts and the assumption by Re-

spondents that Petitioner was not making any allegation that it had made inquiry of Mr. Capacete, Respondents or their counsel prior to the arbitration proceedings.

Oral Argument of Counsel for Petitioner to District Court

The numerous instances in oral argument before the District Court where counsel for Petitioner admitted the honesty and integrity of Mr. Capacete and indicated that no allegation of actual partiality, bias or fraud was being made have already been discussed. *Supra*, at 38-40. In discussion of the issue of disclosure of relationships, no charge was made that Petitioner conducted a personal inquiry or was misled by Mr. Capacete or Respondents or their counsel. A. 74-80. Instead, the general argument was again made by Petitioner that the award should be vacated because of the mere existence of past and remote business relations in accordance with the proposed standard of "Caesar's wife" (A. 75), not because of any wrongdoing by Mr. Capacete or Respondents or their counsel.

Questions Presented as Expressed by Petitioner

The questions as expressly and thoughtfully argued and stated by Petitioner in its Statement of Points to the Court of Appeals (A. 190-191), in its Brief to the Court of Appeals at (p. 1) and in the Petition for Certiorari (at p. 2) do not suggest or allege expressly or impliedly any such contention that inquiry was made. Petitioner's only reference is to an alleged "failure to disclose" and that such alleged "failure" constituted "concealment." Again, there is no allegation that Mr. Capacete or Respondents or their counsel were ever asked about any

previous relationships or qualifications of the arbitrators or that any misrepresentations were ever made by them.

Questions Presented as Expressed by Respondents and Response of Petitioner.

The questions as stated by Respondents in their Brief to the Court of Appeals do not, expressly or impliedly, suggest that such inquiry was the issue but demonstrate such was not an issue. In their Brief to the Court of Appeals, in presenting the question concerning whether Petitioner waived its right to object to Mr. Capacete, Respondents asked in part,

> ". . . where counsel for the complaining party was a close personal friend of the arbitrator with ample opportunities to inquire of previous business relations, did the complaining party not waive its right to object to the arbitrator in question *by failing to inquire of the arbitrator or the other party concerning previous business relations* and remaining silent during the course of the arbitration proceedings until learning that the award was adverse?"[12] (Emphasis added.)

As implied by the question, it was understood by Respondent to be an undisputed truth and fact that no such inquiry had ever been made by Petitioner. Petitioner's Reply Brief to the Court of Appeals contained no objection to this understanding and no argument was advanced that inquiry had been made.

In the Response to the Petition for Certiorari, Re-

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[12]Brief of Respondents to the Court of Appeals, p. 1-2.

spondents again stated as a consideration involved in the question presented,

> ". . . No inquiry was made [by Petitioner] of the party or the arbitrator about business relations. . . ." Brief of Respondents, p. 1.

It is at this point that Petitioner first belatedly and incorrectly took issue with Respondents. Reply Brief of Petitioner, p. 1-2. This unwarranted allegation was answered in Respondents' Petition for Rehearing.

Briefs of the Parties

In the briefs of the parties in the Court of Appeals and in the Supreme Court, prior to the Reply Brief of Petitioner in the Supreme Court, there was no dispute or issue taken concerning the true fact and historical understanding that Petitioner had made no inquiry of Mr. Capacete, Respondents or their counsel. Respondents, in presenting their arguments to the Court of Appeals, stressed the same points of fact in their brief as they made in their brief in opposition to the Petition for Certiorari, to the effect that there was no inquiry made by Petitioner of Mr. Capacete or the Respondents and that Mr. Capacete specifically testified without contradiction by anyone, that he had not been asked about any previous business relationships with any of the parties.[13] Petitioner in its brief to the Court of Appeals and in its Reply Brief to the Court of Appeals did not take issue with these true statements.

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[13]Brief of Respondents to the Court of Appeals, 17-18, 31-32; Brief of Respondents in Opposition to Petition for Certiorari, 9, 18.

Petitioner's Lack of Facts

There has been no allegation, until the Reply Brief of Petitioner in the Supreme Court, that any information on any subject supplied by Respondents or their attorneys by Petitioner, to the arbitrators or to any court in the course of the arbitration and litigation was not totally faithful to the facts and completely truthful. In the Reply Brief Petitioner apparently attempted to argue that either Mr. Capacete or Respondents or their counsel made basic misrepresentations of fact to Mr. Romero concerning previous business relationships; a most serious and totally unwarranted allegation. Reply Br. of Pet., p. 1-2. Petitioner continues to attempt to cast suspicion on Mr. Capacete and Respondents and their counsel by alleging "concealment" (Br. of Pet., p. 13, 15) an allegation implying much more than merely not volunteering information to Petitioner which Petitioner did not in any way ask for and which Respondent knew Petitioner either knew or could easily find out if Petitioner desired to know. Very definitely nothing cited or quoted by Petitioner supports or justifies such an attack. Surely if Petitioner had actually made such inquiry as it now alleges and the business relationship had been denied, or if there were some substance to the allegations of "concealment," as compared to not tendering unrequested information (which Petitioner knew or could easily have known by inquiry), Petitioner would have continually repeated and emphasized such points throughout the litigation with the utmost clarity and specificity, to say the least. The absence of any such argument speaks clearly and conclusively for itself. Petitioner did not ask Mr. Capacete or Respondents or their counsel and there were no misrepresentations by any of them.

Mr. Romero's Affidavit

Petitioner in its Reply Brief quoted the self-serving, general, vague, and indefinite affidavit of Mr. Romero as its sole reference to support the new allegation that inquiry had been made of Mr. Capacete or of Respondents or their counsel. Reply Br. of Pet., p. 2. Petitioner again quotes the affidavit in its brief on the merits, presumably to show "concealment." Br. of Pet., p. 7-8. A mere reading of the affidavit reveals it does not substantiate the charges made. Mr. Romero only stated in his affidavit that he "investigated" the arbitrators; Mr. Romero studiously and clearly avoided making any statement in his affidavit, or elsewhere:

1. That he had personally asked Mr. Capacete, any of the other arbitrators, or the Respondents or their counsel whether there had been previous relationships of any sort between any of the arbitrators and any of Respondents;
2. That any of these persons had "concealed" such information, or prevented or obstructed the "investigation," or that he had been misled in any way by any of these persons; or
3. That he or any of his associate attorneys or any one on behalf of Petitioner had ever asked Mr. Capacete or any of the arbitrators, or the Respondents or their counsel anything about the qualifications or competency of Mr. Capacete or any of the other arbitrators.

Most important, it is strange that the affidavit totally fails to describe and specify of what the alleged investigation consisted. Neither on its face nor by implication does the affidavit support the proposition that inquiry was made of any of these persons by Mr. Romero and never before has this attempted interpretation of the affidavit

been even suggested by Petitioner. Nor does the affidavit say or imply anything from which one could draw an implication of "concealment" or even bad faith of any degree. The affidavit simply says nothing at all about Mr. Capacete or Respondents that is material or relevant to deciding this appeal.

Significantly, the affidavit does not even attempt to deny that Petitioner did not know of the past and remote testing services that had been performed by Mr. Capacete's firm a year or more before the arbitration. The affidavit fails to deny that Petitioner's other attorneys, especially Mr. Robert Ruskin, who was practicing law in San Juan and actively representing the Petitioner when the arbitration proceedings were commenced and the arbitrators were being appointed, did not know of the former relationship. It does not deny that the experienced professional officers and the other members of the management of Petitioner in Puerto Rico did not know of the former relationships or of such other facts as to cause constructive knowledge of the relationship.

More conclusive and legally significant is the complete failure of the affidavit to claim even in general language that Petitioner or its many attorneys had acted reasonably or with ordinary care and diligence in investigating the arbitrators.

Instead of supporting Petitioner, the affidavit legally condemns Petitioner by the following clear and necessary implications:

1. The affidavit admits and confesses that the duty of inquiry and investigation was upon Petitioner and its many attorneys. Otherwise, why did the Peti-

tioner's attorney in its effort to overturn the award feel it legally necessary to make an affidavit that,

> ". . . I investigated the arbitrators to discover if any of them had, in the past or present, any business or financial relationships with A. C. Samford Overseas, Inc. . ." A. 54.

2. The affidavit admits and confesses the Respondents and their counsel had no legal or moral duty to volunteer any information not requested by Petitioner or its many attorneys in Puerto Rico and New York. This is clear because the affidavit expressly states, "None of the arbitrators ever informed me. . . ." A. 54. There is no suggestion that Petitioner, a large and experienced painting contractor, with many able Puerto Rican and New York counsel, members of management and owners, were not competent or able to protect their rights or ask for any information desired or to determine the qualifications and competency of the arbitrators selected to decide their substantial, prolonged, and heated dispute. The affidavit correctly recognizes that this adversary proceeding does not legally or morally impose upon the adversary or their attorneys any obligation to advise the opponent how to conduct and manage the opponent's case; such would have been presumptuous and contrary to the adversary-litigation process and law, as practiced, applied, and approved by the courts uniformly for centuries, in dealing with the qualifications and competency of judges, jurors or, more recently, arbitrators.

3. The affidavit is further discredited and impeached in that it states:

> "5—As a Lawyer, if I [Mr. Romero] had known of any such relationship, I would have challenged said arbitrator's capacity" (A. 54),

whereas the attorney who made the affidavit, on direct examination by his associate New York counsel, in answer to the question as to whether he would have objected had he known of the previous relationship, testified before the District Court, "I don't think I would have objected because I know Mr. Capacete. . ." (A. 151).

4. Also, this interpretation of the affidavit is totally inconsistent with the other many solemn stipulations and judicial admissions made in open court before the Federal District Judge by both Mr. Romero and his associate New York counsel, Mr. Korngold, that the Petitioners ". . . are in no way attacking the arbitrator's integrity. We believe him to be an honorable man" (A. 88), and Mr. Korngold's unequivocal statement, "I would like the record clear that at no time is Mr. Romero or myself accusing any of the arbitrators with doing anything fraudulent" (R. IV, 137 (2)).

5. The above allegation in the affidavit is also inconsistent with Petitioner's ratification and implied stipulation and judicial admission that the arbitrators were qualified and competent as reflected by the Petitioner's expressly stated consent and agreement that the court resubmit the issue to the same arbitrators to allow Petitioner additional opportunity for examining and rebutting evidence, with the expectation of further consideration and a new award by the same arbitrators. This is shown by the following:

> "The Court: Perhaps that may require that I resubmit the case to the arbitrators and have an additional hearing in which you are permitted to go over those documents.
>
> Mr. Romero: All right." A. 91.

The same type of consent, waiver and ratification of

the qualifications and competency of Mr. Capacete and the other arbitrators are clearly reflected by Petitioner's active participation and deliberate submission to Mr. Capacete and the other arbitrators for decision of the dispute regarding the effect, if any, on the arbitration award of a November, 1963, New York bankruptcy order staying litigation. R. V, 138 (35).

Furthermore, the affidavit of Mr. Romero in no way constitutes proof in this action. The affidavit was merely filed by Petitioner along with other pleadings (A. 21-22), the allegations of which were duly answered by Respondent's sworn answer (A. 62-73). Specifically, Respondent replied regarding the affidavit,

> ". . . Defendant denies that the affidavit dated February 6, 1964, of Carlos Romero proves anything with respect to Mr. Capacete and the validity of the arbitration award. . . ." A. 65.

Additionally, Respondents' attorney further denied and contradicted Petitioner's allegations at the hearing. A. 78-81. At the trial the affidavit was never introduced or admitted as evidence. A. 86-183.

This affidavit of Mr. Romero, for these legal and procedural reasons, is undeserving of consideration. However, Petitioner's attempt to now place primary reliance upon it, is reminiscent of Petitioner's attorney's, Mr. Romero's, proposition to the District Court regarding other recollections and testimony of Mr. Romero, ". . . I [Mr. Romero] testified under oath. . ," (A. 178), "So it is a matter of credibility" (A. 178).

The total discrediting and impeachment of the sworn testimony of Mr. Romero on his stated issues of "credibility" are judicial conclusions that warrant consideration

and recognition when this affidavit — given for the same purpose of attempting to overturn the award — is for any reason considered. Also, worthy of recollection are the many formal and serious agreements and stipulations regarding holding hearings on Sundays and holidays, waiving the "30 day rule," etc., that were later repudiated and disregarded for the same purpose of attempting to overturn the award.

The June 25, 1963, letter of Overton A. Currie[14]

[14]The Court of Appeals requested in oral argument that Mr. Currie read from his letter of June 25, 1963; counsel for Petitioner did not object to and took no issue with said letter. For the Court's reference, the letter is quoted in full, as follows:

June 25, 1963

Board of Arbitration of A. C. Samford Overseas, Inc.
and Commonwealth Coating Corp. disputes

Attention: Mr. Jose L. Capacete and Mr. Dwight L. Chapman
RE: *Samford and Commonwealth Board of Arbitration*

Gentlemen:

We received a copy of the June 17, 1963 memorandum of Mr. Jose L. Capacete to Samford and Commonwealth reporting the untimely and unfortunate death of one of the arbitrators, Mr. Aaron Holman.

Samford would have been able to accommodate the hearing as anticipated and approved by the arbitrators to commence during the week of 24 June 1963. Samford regrets that Mr. Holman's death prevented this hearing and hopes that the vacancy created by his death will immediately be filled to permit the arbitrators to establish another date and the arbitration concluded at the earliest possible time.

Mr. Capacete indicated commitments for a Foundation Engineering seminar in Spain this coming fall would require him to spend time in Europe during the next month or so. While

Petitioner attempts to support its argument as to "concealment" by referring to a letter from Overton A. Currie, dated June 25, 1963, to counsel for Petitioner concerning the method of filling a vacancy on the Board of

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we do not interprete [*sic*] his letter as a resignation, he apparently indicates a willingness to step aside if his European commitments are going to unduly delay the arbitration.

In an effort to expedite the hearing and to prevent the loss of the efforts and understanding of the two arbitrators appointed by the opposing parties in agreeing upon and selecting Mr. Capacete as the third arbitrator, Samford has authorized us to stipulate that if Messrs. Capacete and Chapman will continue to serve, then Commonwealth may immediately appoint a third arbitrator to fill the vacancy created by the death of Mr. Holman, without Samford's consent but subject only to the right to object if the person selected is disqualified because of interests or involvements in the matters being arbitrated.

Inasmuch as a full arbitration board had already been appointed and the arbitration clause in the subcontract does not provide a means of filling a vacancy, in our opinion, under Puerto Rican law, the vacancy may be filled by appointment of a local judge. However, rather than suffer the disadvantages and inconvenience and the cost and delay associated with petitioning for such appointment and in an effort to act with fairness, Samford believes that its above suggested mode of filling the vacancy created by Mr. Holman's death will best accommodate the desires of all parties to expedite this matter to conclusion.

We know that Mr. Capacete is very busy and we appreciate the spirit of his letter. We are confident that both parties desire to preserve all that has been accomplished and agreed upon and join in respectfully requesting Mr. Capacete to continue to serve with the pledge that others involved will both understand and make every effort to accommodate his schedule and permit this matter to be heard and decided in the immediate future, and hopefuly in July and before it is necessary for him to go to Europe.

Arbitration following the death of Mr. Holman. The arbitration clause of the subcontracts did not provide for this contingency. A. 46-47. However, the Federal Arbitration Act provided such vacancy would be filled by the Court's designation of a replacement arbitrator if the parties did not otherwise agree. 9 U.S.C.A. §5. The parties were simply in the process of attempting to resolve how to select another arbitrator to replace Mr. Holman. A. 92. Neither this letter of Mr. Currie agreeing to the method of filling the vacancy nor any other evidence concerning this allegation was presented at the trial by Petitioner. A. 86-183. Petitioner nevertheless argues that counsel for Respondents by this letter "imposed a condition" that any substitute arbitrator selected

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Samford is now preparing in detail for the arbitration to permit its availability on short notice. The only conflict I have is a professional commitment to be in Texas during the weeks of July 8 and 15, but if this is the only time that Messrs. Capacete, Chapman and Mr. Holman's successor can serve and Commonwealth be available, then I will attempt to nevertheless arrange to be present at any time during those two weeks. However, may we respectfully suggest Monday or Tuesday, July 22 or 23, as the date to commence the arbitration. It should only require some two days to conclude.

Respectfully,

SMITH, SWIFT, CURRIE, McGHEE & HANCOCK

OVERTON A. CURRIE

CAC:ln

cc: C. A. Romero Barcelo, Esq.
Federico Ramirez Ros, Esq.
Mr. A. C. Samford, Jr.
Mr. Roger Dickinson

by Petitioner ". . . should have no prior business relationships with the parties." Br. of Pet., p. 13.

To support this allegation, Petitioner quotes only from the unsupported and incorrect oral argument to the District Court of its counsel, Mr. Romero (who made the previously discussed affidavit). This argument, as the quotation by Petitioner continues, is duly answered by Mr. Currie where he states that he merely reserved "the right to object because they [any proposed substitute arbitrators] have an interest *in the litigation* or are involved in *it*" (*Id.* at 14; A. 92) (emphasis added), and later again states his reservation to be that "the person didn't have an interest *in the arbitration*" (*Id.* at 15; A. 92) (emphasis added). Clearly Mr. Currie was not making a reservation concerning any and all previous business relations.

To further show that the reservation was limited to the particular matter in controversy as stated by Mr. Currie, Mr. Romero himself at an earlier hearing in oral argument correctly quoted the letter of Mr. Currie by stating that the agreement to the method of selection was "subject only to the right to object, if the person selected is disqualified because of interest or involvement *in the matter being arbitrated.*" A. 77. (Emphasis added.)

Therefore, it is clear that the reservation of a right to object by Mr. Currie was not nearly as broad as is contended by Petitioner. Furthermore, and what is more important, even if the broader reservation had been made, such a reservation obviously would not have constituted "concealment" of any sort, and the limited reservation actually made certainly could not be so construed. Mr. Currie was only reserving a right to object

if the person selected by Petitioner had an interest in the *matter in controversy* to guard against the possible implication that Respondents were unqualifiedly agreeing to *anyone* who might be selected by Petitioner. After all, the law allows one to consent to an interested person serving as arbitrator. As established by the cases hereinafter discussed, this was a right and reservation which Repondents were entitled to preserve, and surely such a normal and customary protection of one's rights cannot be interpreted as a "concealment" of information which had never been requested.

Additionally, and absolutely resolving against Petitioner this unwarranted issue is the fact that Mr. Capacete had been duly appointed, unchallenged, accepted and acting as an arbitrator and chairman of the Board of Arbitration at least since April 25, 1963, while the letter involved was written two months later on June 25, 1963. It could not possibly have misled Petitioner, for Mr. Capacete was duly appointed and serving well before it was written. Additionally, a statement of issues had been previously filed with Mr. Capacete and the other arbitrators by both parties, who had also suggested methods and dates for commencing the arbitration.

The official documents and records of the arbitration proceedings conclusively establish that Mr. Capacete had been duly appointed and was actively serving on the Board of Arbitrators with the knowledge, consent, and active participation of the Petitioner long before – two months before – the June 25, 1963, letter of Mr. Currie was written. It is more than obvious that it could not possibly have misled Petitioner.

Also, the reservation was clearly made only for the

benefit of Respondent Samford as regarded the replacement arbitrator to fill the vacancy on the Board of Arbitrators caused by the death of Mr. Holman. It obviously dealt with and was related only to this subject. It was clearly not written in response to any inquiry about Mr. Capacete and was clearly not representing anything about Mr. Capacete, who for some time had been serving as an arbitrator.

The magnitude and intensity of the heated and active dispute between the parties, two corporations, including many contested and contradicted contentions, beginning with the June and July, 1962 abandonment of the work by Petitioner and the resulting allegations of contractual *default* and *demand* for arbitration, the subsequent Federal Court litigation between Samford's surety companies and the controverted motion to stay the suit to await the arbitration outcome, during all of which time each party had engaged attorneys located in both Puerto Rico and the United States to defend their interests, clearly reveal that there was no fiduciary relationship or reliance between these adversaries to advise or volunteer unrequested information or suggestions to their opponent. Since the parties and their attorneys for a year had been adversaries engaging in active and contested litigation, there is no way Petitioner can in truth and fact argue with any reason or justification that the June 25, 1963, letter of Mr. Currie in any way misled the Petitioner.

The District Court also correctly and reasonably dismissed this unwarranted contention of Petitioner's by indicating Petitioner could have imposed the same condition, but had not. The Court asked Mr. Romero: "You

did not put the same condition?" (A. 89), and later concluded regarding this issue,

> "The Court: That argument, I am not going to pay any attention to that.
>
> Mr. Currie: No need to go into that?
>
> The Court: If they have the right they should have exercised it, regardless of whether your client insisted on that requirement as to the other arbitrator" (A. 92).

(3) *The Legal Authorities*

Petitioner advances the wholly technical and unfounded argument that under the Federal Arbitration Act an arbitration award should be automatically vacated on the ground of "evident partiality"[15] of an arbi-

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[15] *Black's Law Dictionary* defines "evident" as,

> "Clear to the understanding and satisfactory to the judgment; manifest; plain; obvious; conclusive, [authority cited]. Noticeable; apparent to the observation. [authority cited]. That is 'evident' that suggests more than a mental process, but no difficulty in seeing that the thing is true. [Authority cited.]" BLACK, LAW DICTONARY, 4th Ed. (1951).

Webster's Dictionary defines "partiality" as,

> "the quality or state of being partial: a: the inclination to favor one side (as of a conflict or question): BIAS . . . B: a predilection or fondness for one person or one thing rather than others; special taste or liking . . . syn. predilection."

and defines "partial" as,

> "1: inclined to favor one party in a cause or one side of a question more than the other; BIASED, PREDISPOSED . . . 2a (1): having a predilection for a certain person or thing: favorably disposed toward someone or something; biased or prejudiced in one's favor (2): inclined to favor a cer-

trator if the losing party, who prior to the award has made no inquiry of the arbitrator or the other party, learns after the award has been rendered that there was any past business relationship between the other party and the arbitrator, even though such losing party acknowledges such past relationship has had no effect on the proceedings or on the award. Restated, Petitioner contends that if a party or an arbitrator does not volunteer information concerning past business relations, *which information has in no way been requested by the losing party,* this fact alone should be an adequate ground under the Federal Arbitration Act for avoiding and overturning the results of all the work and efforts of the many persons involved in resolving the dispute, regardless of how remote, unrelated, and insubstantial the relationship was or when in the past such relationship occurred and even though such past relationship is admitted to have had no effect on the proceedings or the award and even though such past relationship was known to all or easily discoverable by simple inquiry of others involved who were both always available and often in the presence of and in communication with the complaining party, who waited until he lost the arbitration to so inquire. This position is not only inconsistent with the express language of the Act, but is contrary to the great weight of legal authority and the concept of fair and practical arbitration.

In order to set aside an award, the general rule is that the complaining party must show that the award was the result of an actually biased, partial or fraudulent

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tain person or thing excessively. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (1966).

decision, a much greater showing than of the mere existence of a non-disclosed past relationship. The general and pervading policy is clear, that the courts favor settlement of disputes through arbitration proceedings and will not set aside an award without a clear showing of facts indicating the absence of a fair hearing. 5 Am.Jur.2d *Arbitration and Award* § 167. *American Jurisprudence 2d* states the rule as to vacatur of awards as follows:

> "Though *the courts look with favor on arbitration proceedings and make every presumption in favor of the validity of awards,* this is done on the assumption that these awards constitute the *honest judgment* of the arbitrators, rendered after a *fair hearing*. Consequently, when there is *positive evidence of fraud or collusion* on the part of the arbitrators, they lose all claim to the favor of the courts and, under equitable principles, the awards will will *(sic)* be set aside. Where there has been fraud, the arbitrators have not really acted within the lines of the duty laid upon them; they have not in fact carried out the agreement under which they obtained authority to act. *Corrupt motives, however, are not lightly to be ascribed to the arbitrators."* 5 Am.Jur.2d *Arbitration and Award* § 173. (Emphasis added.)

There is no doubt that positive evidence of actual fraud, collusion, bias or partiality is required before a court will set aside an arbitration award. Courts presume the award is valid and the arbitrators (selected as the contracting parties agreed) faithfully decided the dispute. Only clear, substantial and convincing evidence will invalidate the award, and overcome this universal presumption.

Petitioner quotes on page 21 of its brief on the merits

from 5 Am.Jur.2d *Arbitration and Award*, § 181, apparently in support of its argument that no evidence of actual partiality, bias or fraud is required in order to set aside an award. However, this quotation indicates the opposite is true, because it must be shown that the relationship would "render it unlikely that they [the arbitrators] constituted the fair and impartial tribunal to which the other party is entitled." The paragraph following the paragraph quoted by Petitioner elaborates on what is required to set aside an award and shows clearly that the evidence must indicate *actual* interest or bias before an award will be vacated,

> "An interest or bias to disqualify may be small, but *it must be direct, definite, and capable of demonstration, not remote, uncertain, or speculative.* A person may be disqualified if he is a close relative, servant, employee, or agent of one of the parties, or has any secret interest in the result or decision of the dispute. And where the relationship is not sufficient per se to warrant equitable interference, it will be considered in the light of all the other circumstances of the case, such as the conduct of the arbitrators, or the size of the award. If, when taken as a whole, partiality is evident, the award will be set aside. *But courts will not interfere under their equity powers where the relationship of the parties is casual or such as not to give rise to an inference of unfairness.*" 5 Am.Jur.2d *Arbitration and Award*, § 181. (Emphasis added.)

The Federal Cases

The District Court below relied on the case of *Ilios Shipping and Trading Corp. v. American Anthracite & Bituminous Coal Corp.*, 148 F.Supp. 698 (S.D.N.Y. 1957), aff'd 245 F.2d 873, in holding that Petitioner had failed to show "evident partiality" on the part of Mr.

Capacete. *Ilios Shipping* is the leading case under the Federal Arbitration Act regarding the effect of prior business relationships between an arbitrator and a party on the validity of an arbitration award. In *Ilios Shipping* the arbitrator was an employee of an insurance agency that placed insurance from time to time for an agent of one of the parties to the arbitration proceeding. The court held that this did not constitute sufficient evidence to show "evident partiality" under §10 (b) of the Federal Arbitration Act. The court stated in its holding that,

> "Something more than a vague and rather remote business relationship between the arbitrator and one of the parties to the arbitration is certainly needed if the losing party seeks to vacate the award on the ground of 'evident partiality' of one of the arbitrators. *It is well established that the mere fact that there is some business relationship between the arbitrator and one of the parties to the arbitration is not in and of itself sufficient to disqualify the arbitrator. E. Richard Meinig Co. v. Katakura & Co., Ltd.*, 1 Dept. 241 App. Div. 406, 272 N.Y.S. 735, affirmed 1934, 266 N.Y. 418, 195 N.E. 134." 148 F.Supp. 698, 700. (Emphasis added.)

In the case at bar all that Petitioner has shown is that there were remote, unrelated and casual business relations between the company with which Mr. Capacete was associated, Foundation Engineering Company, and Respondent Samford, and that all of these isolated transactions had been concluded a year or more before the arbitration proceedings. *Supra,* at 16-28. The amount of business with Samford was an insubstantial part of the business of Foundation Engineering Company, only approximately one percent. A. 139, 141. The fees charged were the reasonable and ordinary fees for such services.

A. 65. Furthermore, although Foundation Engineering Company performed a very small amount of foundation or concrete testing work on several of the large government projects involved in the arbitration proceedings, these services were performed long before the disputes arose and had nothing whatsoever to do with the painting work performed by Petitioner or with Petitioner itself or the issues involved in the arbitration. A. 135-142. Mr. Capacete personally had little to do with performing these testing services, less than 10%, and then acted only in behalf of his employer corporation, the Foundation Engineering Company in which he had only a part interest. A. 141. Mr. Capacete also was a Professor of Engineering at the University of Puerto Rico and a partner in another architectural-engineering firm, Capacete, Martin & Gutierrez, which never performed services for Samford. A. 142.

The court in *Ilios Shipping* stated further, with regard to the failure of the complaining party to carry its burden of proof, that,

> "No facts were submitted by respondent to show any substantial financial or business interest of Mr. Ellison [the arbitrator] in petitioner or in the business of the petitioner." 148 F.Supp. 698, 700.

Likewise, in this case there has definitely been no allegation or evidence that Mr. Capacete or Foundation Engineering Company had any interest whatsoever in A. C. Samford Overseas, Inc. or in the outcome of the arbitration. There has not even been any allegation or evidence of the possibility of any future business relationship. To the contrary, the record shows a year or more had passed since any relationship (A. 139), and no future relations could occur since Samford was closing its Puerto Rico operations (R. XVI, 159 (18-19)).

The legal requirement as stated and followed in *Ilios Shipping* is not that a party to an arbitration proceeding or an arbitrator must automatically, without solicitation, voluntarily furnish information as to past business relationships, but that a party instead must make reasonable inquiry concerning these relationships if he wants such information and is held bound by whatever he knows or would have known from such inquiry. In *Ilios Shipping* the protesting party knew that the arbitrator was employed by the particular insurance agency, and on this basis the court held,

> "Respondent could have inquired concerning the business relationship of his firm to any party interested in the arbitration." 148 F.Supp. 698, 700.

Failure so to inquire with knowledge of these facts was held to be a waiver of any objection which the protesting party may have had. Here, Petitioner through its attorney who was a close friend of Mr. Capacete and fellow member of the same Rotary Club had complete information concerning the nature of Mr. Capacete's professional work and associations and the nature of Samford's business and could have easily inquired of any business relationship. A. 146. This duty and opportunity of inquiry should be especially observed in this case where Petitioner knew or should have anticipated that a contractor with such a large volume of work in Puerto Rico as Samford would have used the construction engineering, testing, or consulting services of professional engineers so prominent in Puerto Rico as Mr. Capacete and Foundation Engineering Company. A. 66, 142. See *San Carlo Opera Co. v. Conley*, 72 F.Supp. 825 (S.D.N.Y. 1946), aff'd 163 F.2d 310. It is natural and logical to assume the reason Petitioner did not ask Sam-

ford was because Petitioner either already knew of the past relationship, or at least knew all it desired to know.

It is highly significant that Petitioner says an "investigation" was made prior to the hearings without discovery of the relationship. Br. of Pet., p. 7-8. This allegation can only clearly reflect a recognition that it is incumbent on a party so to inquire. However, the inadequacy of such "investigation" is manifest when none of the interested parties was ever asked about relationships (*supra*, at 16-32); surely Respondents are not to be responsible for such a curious and unexplained failure by Petitioner.

In *Texas Eastern Transmission Corporation v. Barnard*, 177 F.Supp. 123 (D.C.K.Y. 1959), rev'd on other grounds, 285 F.2d 536 (6th Cir. 1960), a far closer relationship than in the case at bar existed between the *sole* arbitrator and the successful party in the arbitration. The arbitrator was an officer and an employee of a bank which was represented as general counsel by the law firm of the attorney for the successful party; the attorney was personally a stockholder in the bank and the attorney's firm was shown to be counsel for the president of the bank and at least six of the seven directors of the bank. The court held that these facts did not warrant vacatur of the arbitration award under the Federal Arbitration Act. The court stated in its holding,

> "Something more than such a vague and rather remote business relationship is needed if the losing party seeks to vacate an award on the ground of evident partiality. [Citing *Ilios Shipping, supra*]." 177 F.Supp. 123, 128.

Petitioner has shown that only a vague and rather remote business relationship existed between Samford and

Foundation Engineering Company. A. 136, 139-142. Even this relationship was terminated a year or more before the arbitration. A. 139.

In *Texas Eastern* the arbitrator's employer and the prevailing party used a common law firm, a relationship existing at the time of the arbitration, and at least with regard to the bank, its president and its board of directors this was apparently a continuing relationship. Moreover, the party's attorney even owned stock in the bank. As stated, in the case at bar there was no such current, immediate, on-going relationship between Foundation Engineering and Samford, but the last transaction had occurred a year or more before the arbitration. A. 139. Nor was there any interest on the part of Samford, the other Respondents or their representatives in Foundation Engineering or any other entity with which Mr. Capacete was affiliated; the relationship which had existed in this case indeed was far more vague and more remote than in *Texas Eastern*.

Earlier the Sixth Circuit had occasion to state in *Kentucky River Mills v. Jackson*, 206 F.2d 111, 47 A.L.R.2d 1331, (6th Cir. 1953), cert. den. 346 U.S. 887, 74 S.Ct. 144, 98 L.ed. 392,

> "But it is the proof of bias or unfairness or partiality on the part of an arbitrator that results in unjust advantage, and calls for the setting aside of the award." *Id.* at 117. (Emphasis added)

As indicated by *Kentucky River Mills* and by the other cases discussed above, there must be a showing of facts to warrant the conclusion that the relationship between an arbitrator and a party was such as to conclude that there was a corrupt or unjust effect of some sort on the

arbitration before an award will be vacated. Petitioner has not alleged or provided any evidence that Mr. Capacete in any way gave Rumford an "unjust advantage" or that the relationship had any effect on the award. To the contrary, Petitioner, through its attorney, expressly has admitted such did not occur by repeatedly admitting the honesty, integrity and ability of Mr. Capacete. A. 75, 80-81, 88.

A recent Second Circuit decision, *Saxis Steamship Co. v. Multifacs International Traders, Inc.*, 375 F.2d 577 (1967), outlines the procedure to be followed by a court when a challenge of partiality is presented. The court summarized,

> "It is true that when a claim of partiality is made, the court is under an obligation to scan the record to see if it demonstrates 'evident partiality' on the part of the arbitrators. [Authority cited.] The burden of proof on this issue in the confirmation proceedings in the District Court rests upon the party making the claim. . . ." *Id.* at 582.

Such a "scanning" of the record in this case can only reveal that the proceedings were totally fair and the arbitrators were wholly impartial, providing the parties with a just hearing of their dispute. And referring to the Supreme Court's discussion in *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.ed. 168 (1953) concerning overturning an award where there has been a "manifest disregard" of the law, the Second Circuit states,

> "Any such exception must be severely limited, *because extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of*

extended court proceedings. [Authorities cited.]" *Ibid.* (Emphasis added.)

The some six years of litigation in this case are an unfortunate testimonial to what can happen to a remedy supposedly quick, efficient and inexpensive. Petitioner is proposing a technical, theoretical and abstract test of what is to be deemed "evident partiality" rather than a rule based on the facts, the evidence, and the practical and warranted conclusion to be drawn; the argument of Petitioner concludes that the award should be vacated although there is admittedly no effect of the remote and past business relations on the unanimous award of highly respected and honorable professional experts, who were legally guided by the lawyer-arbitrator appointed by Petitioner.

New York Cases

There have been a number of cases decided under the New York statute, N.Y. Civ. Prac. §§7501-7514, and its predecessor statute, interpreting what constitutes "evident partiality." The principal cases reflect the rule that definite and discernable partiality must be shown, not a mere business relationship by itself, much less a remote relationship occurring a year or more before the arbitration, before an award is to be vacated on the ground of "partiality."

In the case, *E. Richard Meinig v. Katakura & Co.*, 241 App. Div. 406, 272 N.Y.S. 735 (App. Div., 1934), affirmed 266 N.Y. 418, 195 N.E. 134, relied on by the Second Circuit in *Ilios Shipping, supra.*, both parties to the arbitration were dealers in silk. The *third arbitrator* selected by the two arbitrators named by the parties was an officer of a firm which, from time to time, purchased raw silk from a party to the arbitration, Katakura & Co.

The trial court had held that the arbitrator's firm was under "definite obligations" to Katakura and vacated the award. The Appellate Division reversed and the Court of Appeals then affirmed, holding that this business relationship between a buyer and seller was not sufficient to invalidate the arbitration award. The Appellate Division stated in its holding,

> "It is idle to urge that, simply because of his connection with a corporation which occasionally purchases raw silk from the appellant, he was thereby disqualified from acting as an impartial member of the Board of Arbitrators. If we were to give heed to the contentions of every unsuccessful litigant, based upon the flimsy ground assigned here, *it would be well nigh impossible to carry out that part of the contract pertaining to arbitration, which is usually found in agreements entered into by silk merchants.*" 272 N.Y.S. 736. (Emphasis added.)

In the case at bar the relationship was that of independent engineering consulting firm providing unrelated testing of sand, gravel, concrete, and compaction of soil from time to time on an isolated, piecemeal, arms-length basis, which services had been concluded and terminated prior to the dispute between the parties and approximately a year or more before the arbitration proceedings. A. 139. Furthermore, these engineering services had nothing whatever to do with painting, the issues involved in the arbitration or the business of Petitioner. A. 139. There is less significance in the past and remote relationship in the case at bar than the apparently continuing relationships involved in the *Ilios Shipping* case of insurance purchaser and insurance agent and that involved in the *Meinig* case of customer and supplier. Thus, reaching the same result of upholding the award

in this case as in the *Ilios Shipping* and *Meinig* cases would be even more justified, sound, and warranted.

The *Meinig* case points out a most important practical factor relevant to the case at bar: an arbitrator is often selected because of his possessing particular skills or experience in the type of business where a dispute has arisen and therefore he should not be disqualified merely because he has had previous business relationships with one or more of the parties to the arbitration proceeding participating in that business. The court in the *Meinig* case indicated that it would be "well nigh impossible" to carry out arbitration proceedings in the silk business if one could set aside proceedings simply on the basis of previous business relationships, because it was on the basis of such experience that such arbitrators were chosen in the first instance. It is submitted that the same sound and practical reasoning applies to the case at bar where the well-known professional competence of a Puerto Rican consulting construction engineer was sought to resolve disputes concerning five large Puerto Rican construction projects. It is of great significance that Foundation Engineering Company was the only firm in Puerto Rico performing such engineering services prior to 1957, the larger of two such firms in Puerto Rico between 1957 and 1959, and one of a total of only three such firms in Puerto Rico after 1959. A. 141-142. Even the District Court below acknowledged the high professional reputation of Mr. Capacete by commenting from the bench that he believed him to be "the most competent man" in his business in Puerto Rico. A. 81. Equally important is the fact Petitioner's attorney repeatedly admitted his integrity and honorable standing. A. 75, 80-81, 88. It is only logical to assume under these circumstances

that most contractors in Puerto Rico would have had occasion to use these common and customary construction testing services, and this was confirmed by the testimony of Mr. Capacete. A. 142.

In the more recent and the leading New York case, *Cross Properties, Inc. v. Gimbel Brothers, Inc.*, 225 N.Y.S. 2d 1014 (App. Div. 1962, aff'd 236 N.Y.S. 2d 61 (Ct. App.), it was again held that although a party and the *third arbitrator* had had prior business relationships, nevertheless such relationships did not disqualify the arbitrator. The Appellate Division stated,

> "Where there are undisclosed dealings between a party and an arbitrator which impart a lack of impartiality and fairness, the award made is subject to vacatur. . . . *However, this is not to say that any undisclosed relationship, no matter how peripheral, superficial or insignificant, compels the same result.* 'Courts are loathe to sustain belated claims of disqualification after an adverse award.' (Matter of Atlantic Rayon Corp. [Goldsmith], 277 App. Div. 554, 556, 100 N.Y.S.2d 849, 850). . . . The type of relationship which would appear to disqualify is one from which it may not be unreasonable to infer an absence of impartiality, the presence of bias or the existence of some interest on the part of the arbitrator in the welfare of one of the parties. While there was a 'relationship' here between the respondent and the arbitrator, we find it not to be a disqualifying one. *The transactions between them were isolated and involved nothing of such a nature as would cause Spear to act other than with requisite impartiality. The nature and magnitude of the real estate company with which Spear was affiliated would make it most likely that at one time or another there would be some contact with one of the largest department stores in the City of New York.*

> *Whether or not Spear disclosed such relationship to the tribunal clerk is of no consequence. The rules of the arbitration association required a disclosure only if the circumstances were 'likely to create a presumption of bias' or were such as would make the arbitrator believe 'might disqualify him as an impartial arbitrator.' In the light of the nature of the relationship, a failure to disclose would not have been violative of the rules."* 225 N.Y.S.2d 1014, 1016-1017. (Emphasis added.)

It is submitted that proof in the case at bar shows that the relationship between Foundation Engineering Company and Respondent Samford was in fact superficial and insignificant and that the transactions between the parties were isolated and none occurred within a year or more before or during the arbitration proceedings. A. 136, 139-142. Moreover, Petitioner has made no allegation that the relationship had any actual effect on Mr. Capacete or the outcome of the arbitration proceedings. Thus there can be no doubt that, as in *Cross Properties*, there is here nothing of such a nature as would have caused Mr. Capacete, a professor and an admittedly honorable professional engineer (A. 75, 80-81, 88) of the highest reputation "to act other than with requisite impartiality."

Additionally, the arbitrator in *Cross Properties* had been selected pursuant to the rules of the American Arbitration Association and consequently an affirmative duty to disclose possibly disqualifying relationships had been incorporated by contract. As no such duty was incorporated in the subcontracts with Petitioner, there is far more reason to sustain the award in this case than in *Cross Properties*. Even under the stringent Association rule of disclosure, *Cross Properties* held the relationship

was not the sort that had to be revealed, and the court intimated that the losing party was bound by those facts he could reasonably have expected to have existed. In the case at bar Petitioner, if it did not actually know of the past relationship, should most definitely have expected such a relationship to have occurred between a major contractor in Puerto Rico and probably the leading construction engineering testing and consulting firm in Puerto Rico, a "contract" certainly no less to be anticipated than that between a large real estate company in New York and Gimbel's.

There is an abundance of other legal authorities supporting Respondents' position that to vacate an award and allow an unsuccessful litigant to reopen decided disputes there must be positive proof of actual partiality, bias or fraud or some other actual misconduct and a showing of the reasonable and probable likelihood of adverse effect of such conduct on the award, far more than only a showing of the mere existence of a relationship which was not disclosed. *Fireman's Fund Ins. Co. v. Flint Hosiery Mills,* 74 F.2d 533, 104 A.L.R. 556, (4th Cir. 1935), cert. den. 295 U.S. 748, 55 S.Ct. 826, 79 L.ed. 1692 (1935); *The Hartbridge,* 62 F.2d 72, (2nd Cir. 1932), cert. den. 288 U.S. 601, 53 S.Ct. 320, 77 L.ed. 977 (1933); *National Fire Ins. Co. v. O'Bryan,* 75 Ark. 198, 87 S.W. 129 (1905); *Cecil v. Bank of America Nat'l Trust & Sav. Ass'n,* 107 Cal.App.2d 38, 236 P.2d 408 (1951); *Riccomini v. Pierucci,* 54 Cal.App. 606, 202 P.344 (1921); *Giddens v. Board of Educ. of City of Chicago,* 398 Ill. 157, 75 N.E.2d 286 (1947); *First Nat. Bank in Cedar Falls v. Clay,* 231 Iowa 703, 2 N.W.2d 85 (1942); *Young v. New York Underwriters Ins. Co.,* 207 N.C. 188, 176 S.E. 271 (1934); *Knicker-*

bocker Textile Corp. v. Leifer Mfg. Corp., 278 App. Div. 351, 105 N.Y.S.2d 200 (1951); 6 WILLISTON, CONTRACTS § 1923A. See *Karppinen v. Karl Keifer Machine Co.*, 187 F.2d 32 (2nd Cir. 1951); *General Construction Co. v. Hering Realty Co.*, 201 F.Supp. 487 (E.D.S.C. 1962) appeal dismissed; 312 F.2d 538 (4th Cir. 1963), *Cf. Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.ed. 168 (1953); *Amicizia Societa Nav. v. Chilean Nitrate & Iodine S. Corp.*, 274 F.2d 805 (2nd Cir. 1960), cert. den. 363 U.S. 843, 80 S.Ct. 1612, 4 L.ed.2d 1727 (1960).

The Cases Relied Upon by Petitioner are Clearly Distinguishable and Do Not Have Any Bearing On the Case at Bar.

Rogers v. Schering Corporation, 165 F.Supp. 295 (D.C.N.J. 1958), aff'd 271 F.2d 266, cert. den. 359 U.S. 991, the case principally relied upon by Petitioner, concerned an arbitration clause in a written contract which required that the parties submit disputes to arbitration pursuant to the rules of the American Arbitration Association and to select arbitrators from panels furnished by the American Arbitration Association. The District Court, in an elaborate and detailed discussion, held that Section 18 of the American Arbitration Association rules expressly and specifically required disclosure by the Arbitrator to the parties of "any circumstances likely to create a presumption of bias or which he (the arbitrator) believes might disqualify him as an impartial arbitrator." Thus, these Association rules in practical effect specifically and expressly "ask" or "inquire" of the arbitrator about possible disqualifications. Naturally a party who by contract agrees to be bound by these American Arbitration Association rules has the right to rely upon their being followed and performed. It is also most significant that even these rules place absolutely no duty on the other party to volunteer such information.

Since in the *Rogers* case information of this sort had not been furnished by the Association to the parties in violation of this express Association rule and provision although the arbitrator had furnished the information to the Association, the court vacated the award.

In practical effect, the parties in *Rogers* expressly *contracted* for disclosure to be made by the arbitrator of

disqualifying relationships by incorporating the Association rules. In the case at bar the parties made absolutely no reference in their contracts to the American Arbitration Association or its rules. No such disclosure provision of any kind requiring the disclosure of any such information was incorporated or provided in the contracts. A. 46-47. Thus if either of the two corporations agreeing to this arbitration desired such information, it had to inquire. The general and practical rule that there is no such duty of volunteering unsolicited information remains properly controlling of the case at bar. The mere fact that isolated and remote business relations existed a year or more before the arbitration is not sufficient alone to vacate an award. This is a reasonable, practical, and understandable rule and result. If such information is desired by a party to arbitration proceedings, the obligation rests upon that party simply to inquire of the arbitrator or other party whether such business relations have occurred.

Interestingly enough, the objecting party in *Rogers* did investigate the arbitrator and discovered the relationship during the arbitration proceedings and made known its objection at that time. Even with the American Arbitration Association rules expressly incorporated by contract, the facts of the *Rogers* case reflect the reasonable actions and care taken by an ordinarily prudent party to an arbitration in protecting any rights it does not wish to be waived.

In *Milliken Woolens, Inc. v. Weber Knit Sportswear, Inc.*, 11 A.D.2d 166, 202 N.Y.S.2d 431 (1960), aff'd 9 N.Y.2d 878, 175 N.E.2d 826, the New York court held that the two arbitrators who had decided the dispute before the arbitration board in favor of Milliken Woolens

should be disqualified on the basis of the unusual facts of the case and because of the close relationships existing between two arbitrators and Milliken Woolens. It was shown that one arbitrator, an attorney, had previously been a member of the same law firm as the trial counsel for Milliken Woolens and the arbitrator's firm had served in a number of matters as co-counsel with the firm representing Milliken Woolens, one of which was pending at the time of the arbitration. Although this close relationship existed, this arbitrator merely advised Weber Knit that he was "acquainted" with each of the attorneys of the parties, and the court felt that this statement may well have "misled" Weber Knit. The second arbitrator, among several other substantial relationships with Milliken Woolens, had for many years purchased a considerable part of the requirements of his business from Milliken Woolens or its affiliates, the numerous transactions amounting to millions of dollars. On the basis of these as well as other factors, the court held that both arbitrators should be disqualified.

In the case at bar there was never any close relationship between Mr. Capacete and Samford such as co-employee. The limited relationship occurred a year or more before the arbitration and consisted of only isolated and remote transactions between independent contractors, a construction company and a professional consulting corporation doing construction testing, of which Mr. Capacete was only a part owner. A. 136, 140. Furthermore, as discussed above, there is absolutely no possibility in the case at bar that Petitioner was in any way "misled" by Mr. Capacete or Respondents or their counsel as the court found in *Milliken Woolens*. The importance of this difference is stressed by the Appellate Division later in *Cross Properties, supra,* in distinguish-

ing the facts in *Cross Properties* from *Milliken Woolens*, as follows:

> ". . . there [in *Milliken Woolens*] the relationship between one of the arbitrators and the attorneys for one of the parties was such that there could be no question but that it could reasonably be inferred that there was present partiality or bias. In addition, there the arbitrator had not only failed to disclose the true relationship *but had also made affirmative statements concerning the same which were less than the truth and—one must conclude—were designed to mislead*. Not so in this case. 225 N.Y.S.2d 1014, 1017. (Emphasis added.)

Here the past, occasional and remote testing services involved an amount of money that was most insignificant compared to the millions of dollars of business involved in *Milliken Woolens* and compared with the volume of business of Foundation Engineering Company. The court in *Milliken Woolens* actually indicates that under different circumstances, such as in the case at bar, the decision should be the opposite from that reached in *Milliken Woolens*, by stating with regard to the number of transactions involving millions of dollars between the firm of the arbitrator and Milliken Woolens,

> "They may not be regarded as *the casual or occasional dealings which might be expected where arbitrators are chosen because of familiarity with an industry*. [Authorities cited.]" 202 N.Y.S.2d 431, 435.

In the case at bar we have exactly the situation where there have been only "casual or occasional dealings" and where the arbitrator, Mr. Capacete, could be expected to have had such dealings through Foundation

Engineering Company because of his expert professional knowledge of the construction business. And even these transactions occurred a year or more before the arbitration.

Milliken Woolens is distinguishable for an additional reason of utmost importance for, as in *Rogers v. Schering Corporation, supra,* the arbitration was conducted under the rules of the American Arbitration Association, and the parties by agreement had required disclosure of disqualifying relationships, which duty had been violated by the arbitrators' failure to disclose what the court found to be, and could hardly have avoided finding, such disqualifying relationships. There was no such agreement to disclose in the case at bar, which is a fundamental difference entirely aside from the fact there were no such disqualifying relationships between Mr. Capacete and Samford or the other Respondents.

In *Matter of Friedman,* 215 App.Div. 130, 213 N.Y.Supp. 369 (1926), relied upon by Petitioner, it was found that a very substantial financial relationship existed between a party and one of the arbitrators considerably different from an ordinary business relationship. *The party had loaned the arbitrator $5,000 during the arbitration proceedings,* causing the arbitrator to be in debt to the party at the time of deciding the controversy. In the case at bar there were no business relations between Mr. Capacete or Foundation Engineering Company and Samford during the course of the arbitration proceedings, and even all of these occasional past, remote business relations had been completely terminated a year or more before the arbitration. A. 139; R. III, 116 (6). Furthermore, in *Friedman* there was evidence

of actual partiality or bias, as the court states there was a showing that the arbitrator,

> ". . . manifested the utmost bias in favor of the party who befriended him, and refused to listen to argument or evidence in support of the claims of the opposing party." 213 N.Y.S. 369, 376.

In the case at bar there is not even an allegation of actual bias or partiality, but the admission was made such did not occur. A. 75, 80-81, 88. Also, here the District Court expressly found that "the record shows that the arbitrators conducted fair, impartial hearings." A. 185. Therefore the *Friedman* case is obviously distinguishable.

In *American Guaranty Co. v. Caldwell,* 72 F.2d 209 (9th Cir. 1934) the trial court had held that the appointment of an arbitrator was irregular and illegal and vacated the award on the ground of evident partiality. The 9th Circuit Court of Appeals affirmed, expressly resting its conclusion that the arbitrator was "inherently partial" on *two* grounds, "taken together": (1) "the method of appointment as provided in the agreement was not followed" (which is a sufficient ground alone for voiding an award), and (2) "the arbitrator appointed had a business relationship with one of the parties." *Id.* at 212. The court does not say, as argued by Petitioner (Br. of Pet. at 21), that the latter ground alone would require vacatur, but instead is compelled to rely on *both* grounds; nor does the court find it necessary, in view of the fact the appointment was otherwise illegal and not in accord with the agreed method of appointing, to discuss the details of the "business relationship." Most significant, however, is the indication that there was *actual*

partiality; the Court of Appeals summarized the District Court's decision as, in part, holding, "that his [the arbitrator's] *actions* as umpire were partial to appellant." *Id.* at 211. (Emphasis added.) Thus, for these reasons this case is no authority for the proposition that any past business relationship per se will disqualify irrespective of its remoteness and insubstantial nature.

The case of *Knickerbocker Textile Corporation v. Sheila Lynn, Inc.*, 172 Misc. 1015, 16 N.Y.S.2d 435 (1939) involved an arbitration proceeding where the third arbitrator was treasurer of a company which had just received a favorable award in another arbitration proceeding in which one of the arbitrators who had voted for the award was the president of Knickerbocker Textile Corporation. The Court summarized this relationship, "Granowitz [the president of Knickerbocker] decided for Arnoff's company and Arnoff [the arbitrator being challenged], in turn, decided for Granowitz's, 16 N.Y.S.2d 435, 437. The Court additionally found that the Director of the Arbitration Bureau of the Silk Association had made inquiry of the parties and the arbitrators concerning objections to the arbitrators who had been selected, and that upon this inquiry the challenged arbitrator, Mr. Arnoff, should have revealed the facts about the previous arbitration proceeding. The court found that such failure to reveal constituted "misbehavior," but did not hold that this was partiality under the New York Statute, 16 N.Y.S.2d 435, 447.

There was obviously no such "misbehavior" on the part of Mr. Capacete, and none has been charged. As he testified, no inquiry was made of him. A. 146. There had been no recent relationship between Mr. Capacete and Samford as in *Knickerbocker* where the award in the

prior arbitration was rendered only three days before Mr. Arnoff received notice of his appointment as arbitrator. For these reasons, the Knickerbocker case is clearly inapplicable to the case at bar.

Merolla v. Motor Vehicle Accident Indemnification Corporation, 231 N.Y.S.2d 760 (1962), cited by Petitioner, is distinguishable for two principal reasons. First, the arbitration was under the rules of the American Arbitration Association, incorporating by contract, therefore, a provision and rule expressly requiring the furnishing or *"volunteering"* of information as to relations likely to disqualify, as in *Rogers v. Schering Corporation, supra.* Totally significant is the fact that such a provision is not present in the arbitration agreement here. Secondly, the business relation was very close, the sole arbitrator being employed as the attorney of record in the auto liability division of a member company in the party's corporate structure. There was no such employer-employee relationship in the case at bar.

Petitioner cites *Astoria Medical Group v. Health Insurance Plan* 11 N.Y.2d 128, (227 N.Y.S.2d 401) (1962) and the amendment enacted in 1962 to the New York arbitration statute, N.Y. Civ. Prac. §§ 7501-7514, in making the argument that a party's arbitrator may be partisan or biased, but the third arbitrator should not be. However this distinction has no bearing on the authorities relied upon by Respondents. Unless there is a statute or a contract term to the contrary, the vast majority of the decisions make no distinction between party-appointed arbitrators and the third arbitrator in ruling upon their qualifications.[17] See, *e.g., Ilios Shipping,*

[17]See Case Note, *Party-Nominated Arbitrator In Tripartite Arbi-*

supra, and *Texas Eastern, supra.* Additionally, the *Meinig* and *Cross Properties* cases, *supra,* are cases where the challenge was to the alleged partiality of the *third arbitrator* due to business relations with a party.

Cases where arbitration awards have been vacated, including the cases principally relied upon by Petitioner, may be summarized as involving circumstances reasonably giving rise to at least a warranted conclusion, and in most cases actual proof, that the losing party did not receive a fair hearing; there is always present in these cases either the facts to warrant the inference or actual proof that the disqualifying relationship has had some corrupting or unfair effect on the proceedings and the award. See, *e.g., Milliken Woolens, supra.* Additionally, in cases where the rules of the American Arbitration Association are incorporated by contract, the burden of making inquiry concerning disqualifying relationships is expressly and by contract placed on the Association, and therefore where disclosure of such a relationship has not occurred as required by the arbitration agreement, the award must be vacated because of the failure to follow the contractual procedure and requirement for disclosure, not because of any failure to comply with any alleged duty otherwise existing to volunteer unsolicited information of such a nature. See, *e.g., Rogers v. Schering Corporation, supra.* Petitioner does not argue that the arbitration proceedings were unfair in any way or attempt to cast any suspicion on Mr. Capacete, and many times stipulated or admitted otherwise. A. 75, 80-81, 88. Also, as stated, the District Court specifically found that the record showed the arbitrators conducted

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tration Agreement Not Disqualified Because of Partisanship, 14 Syracuse L. Rev. 102, 103 (1962).

"fair, impartial hearings." A. 185. Nor is any argument made that there was a violation of any contractual duty to disclose. Consequently, the cases cited by Petitioner clearly do not support the position Petitioner has taken.

(4) *The Legislative History of the Federal Arbitration Act*

The legislative history of the Federal Arbitration Act reflects two principal purposes of the legislation: (1) the Act was to make enforceable and irrevocable arbitration agreements as a private, contractual remedy, and (2) to avoid the "evils" of the delays and the expense of litigation and the sometimes unsatisfactory results obtained in litigation not consistent with the practices and practical requirements of the business world. The Act was not intended to create another judicial type of forum with the attendant technical rules, delays, and complex procedures incident to a formal proceeding, but to avoid these problems by creation of an informal, simple procedure which would end the dispute with the prompt rendition of an award. Recourse to the courts was provided, but only in a rather summary proceeding and intentionally limited to functions far more narrow than the courts were used to exercising.

In the House Report, it is stated,

> "Arbitration agreements are *purely matters of contract*, and the effect of the bill is simply to *make the contracting party live up to his agreement.*" HR Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). (Emphasis added.)

Mr. Julius Henry Cohen, draftsman for the American Bar Association, wrote of the evils to be corrected in a brief submitted to the Joint Committee, as follows:

> "The evils at which arbitration agreements in gen-

eral are directed are three in number. (1) The *long delay* usually incident to a proceeding at law, in equity or in admiralty, especially in recent years in centers of commercial activity, where there has arisen great congestion of the court calendars. This delay arises not only from congestion of the calendars, which necessitates each case awaiting its turn for consideration, but also frequently from preliminary motions and other steps taken by litigants, appeals therefrom, which delay consideration of the merits, *and appeals from decisions upon the merits which commonly follow the decision of any case of real importance.* (2) *The expense of litigation.* (3) *The failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world.* This failure may result either because the courts necessarily apply general rules which do not always fit a specific case, and because, in the ordinary jury trial, the parties do not have the benefit of the judgment of persons familiar with the peculiarities of the given controversy." Joint Hearings before the Subcommittee on the Judiciary, 68th Cong., 1st Sess., 7 (1924) at 34-35.

It is to be noted from Mr. Cohen's brief that one of the areas in which the Act was intended to cure delay was in appeals from decisions on the merits. Similar statements of intent to avoid the delays and expense of litigation were often repeated by the sponsors of the legislation and its other supporters, including the then Secretary of Commerce, Mr. Herbert Hoover.[18]

The policy of obtaining a speedy, binding and inexpensive resolution of disputes required a high degree of

[18]House Report and Joint Committee Report, *supra;* also S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) and Hearings on S. 4213 and S. 4214, before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923).

finality of the awards, or otherwise arbitration would become just another level to add to the existing tiers of the judicial structure and perhaps would create even more delays. Consequently the Act provided for a most limited form of review, an award being subject to vacatur or modification only upon those grounds specifically listed in Section 10. Mr. Cohen, the draftsman, interpreted these provisions of the bill as follows:

> "The motion to enforce may be opposed or an independent motion may be made to vacate, modify, or correct the award. *There is no opportunity for vacation upon a technical ground. The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced. This exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means—cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.*" Joint Hearings, *supra* at 36. (Emphasis added.)

In the strong and definite language of the author of the bill, a defect in an award must be "inherently vicious" before as a matter of "morality," not because of violation of some technical rule, the award will be set aside.[19]

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[19]These purposes were again expressed by Mr. Cohen, with co-author Kenneth Dayton, in *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, at 272-273 (1926); see also *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153 (1925) (report from the Committee on Commerce, Trade and Commercial Law of the American Bar Association following passage of the bill the Association had sponsored).

Any other rule would frustrate the major purpose of using arbitration – to avoid litigation.[20]

The Supreme Court has recognized the basic purposes of parties in their resort to arbitration. In *Wilko v. Swan, supra,* the Court stated,

> "The United States Arbitration Act establishes by statute the *desirability of arbitration as an alternative to the complications of litigation.* The reports of both Houses on that Act stress the *need for avoiding the delay and expense of litigation,* and practice under its terms raises hope for its usefulness both in controversies based on statutes or on standards otherwise created." 346 U.S. 427, 431-432. (Emphasis added.)

In *Prima Paint v. Flood & Conklin,* 388 U.S. 395, 87

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[20]The reasons for limited judicial review of awards are well and succinctly stated in Note, *Judicial Review of Arbitration Awards on the Merits,* 63 Harv. L. Rev. 681 (1950),

> ". . . a policy of non-review will implement what is generally considered to be the parties' main purpose in resorting to arbitration—to avoid litigation. Litigation tends to frustrate the hopes generally entertained by parties who submit to arbitration, namely, that the arbitration process would be relatively cheap and quick; that the dispute would be judged by men familiar with the practical intricacies of their type of relationship and disposed to give weight to nonlegal factors like businss ethics; and that the hearing, conducted in a less formal and combative atmosphere, would have a less disruptive effect on the parties' possibly continuous relationship. A practice of liberal review thus tends to increase the workload of the courts: not only will cases be transferred from arbitral to judicial tribunals, but also the parties will tend to resort to the courts originally because they will wish to avoid the 'extra step' of an arbitration proceeding." *Id.* at 681-682.

S.Ct. 1801, 18 L.Ed.2d 1270 (1967) the Court again had occasion to state the congressional purposes of the Act with regard to the relationship of arbitration and litigation and strongly enforced these purposes by holding that the issue of fraud in the inducement of a contract is a question for arbitration under the contract and is not a matter to be determined in advance by a court. The Court stated,

> "In so concluding, we not only honor the plain meaning of the statute but also *the unmistakably clear congressional purpose that the arbitration procedure,* when selected by the parties to a contract, *be speedy and not subject to delay and obstruction in the courts.*" 388 U.S. 395, 404. (Emphasis added.)

It is earnestly submitted by Respondents that an overturning and annulment of the award and the thousands of hours of work required to arbitrate and resolve the complex disputes in the case at bar would completely frustrate the major purpose of arbitration, namely, to provide a quick, final and inexpensive form of relief. To hold that there is sufficient ground for vacatur would establish an unnnecessary rule by which losing parties in arbitration proceedings could challenge the awards and avoid their confirmance until appeals become exhausted years later. In this case it will be at least five years since the rendition of the award before a final decision is reached as to its validity. A. 30-35.

Any such unwarranted rule would have to be of a technical, theoretical and "legalistic" nature, clearly contravening the informal nature of arbitration and the purposes of the Federal Arbitration Act. Such a rule would take little or no account of the effects, or lack thereof, of business relationships on the arbitration because Peti-

tioner's admissions concerning Mr. Capacete's past business relations conclusively establish they had no effect on the proceedings or the award. Such a rule would have to impose a duty on the arbitrator, and/or the parties, to volunteer information concerning past, unrelated and remote business relations, although such information has not been requested by anyone, and even though arbitration is a matter of contract, and the contracting parties in no way agreed to require such information to be volunteered. The two business corporations involved could have so contracted, but they each elected not to exact this additional contractual duty of each other or to establish it as a part of their contract arbitration rules. Surely, to impose judicially without legislative mandate such an absolute procedural duty would be to create a technical form, rather than honor the practical circumstances which exist in commercial arbitration, at the greatest of costs to the parties and in denial of the purposes of arbitration, vacatur by subsequent litigation for technical, procedural considerations. Even though arbitration may be amicable, it is still an adversary proceeding, each party trying to make certain the arbitrators selected are impartial and free to be convinced that his position is right and he should in all fairness prevail. In this situation a party, and even arbitrators, are not likely, and are not required, to examine all of their past relationships, experiences, and contacts, and those of their family and affiliates, to see and judge if there is not some information to volunteer; instead the subconscious, or conscious, assumption is that if a party wants to know if ever there has been a relationship of some kind, the question will be *asked*.

Absent such inquiry it is natural to assume the parties

have otherwise decided the arbitrator has the moral and technical abilities to be fair in his decision and thus do not inquire or object to the arbitrator's deciding the dispute. Consequently, there is practical, functional, reasonable and legal consent which binds and estops the losing party from silently waiting until losing before objection. It would be immoral, inequitable and wrong to allow a losing party to have enjoyed the possibility of winning and binding "his opponent," while he participates in the arbitration without making such easy inquiry, but secretly waits to repudiate and reject the arbitrators if he dislikes their decision. Fair play and law should not tolerate such "one-way" and non-mutual "my way or no way" tactics. To create such a rule would be to construct a trap for not only the unwary but most of those seeking to arbitrate under the Act who naturally presume the process to be informal and without such procedural hazards as one would possibly anticipate and protect oneself against in litigation where one has adequate notice of such technical rules.

3. Petitioner Waived any Right it May Have Had to Object to the Appointment of Mr. Capacete as an Arbitrator.

Even if it is assumed for purposes of argument that the business relationship between Mr. Capacete and Samford could obviate the award, which argument Samford denies, Petitioner nevertheless waived any and all objections it may have had to Mr. Capacete as an arbitrator. By reason of this waiver by Petitioner, and on this ground alone, the District Court and Circuit Court were justified in confirming the award.

American Jurisprudence 2d states the general rule with regard to waiving an objection on the basis of bias or partiality of an arbitrator, as follows:

> "Though an arbitrator appears to be biased because of relationship to one of the parties or for other reasons, an action to stay the arbitration or to disqualify the arbitrator or to set aside an award on the basis of the bias or prejudice will not be successful if the moving party knew, at the time the agreement was made, of the facts alleged to constitute the bias or prejudice, or failed to object at the earliest opportunity in the arbitration proceedings." 5 Am.Jur.2d *Arbitration and Award,* § 101.

Furthermore, if the objecting party had knowledge of facts or circumstances which suggested or possibly indicated or inferred the possibility of the existence of some past or present business relationship between an arbitrator and the opposing party, it is incumbent on the objecting party to make an adequate and proper investigation and inquiry of the arbitrator or opposing party; otherwise the unsuccessful litigant who later objects will be deemed to have consented to the selection of that arbitrator or waived the right to object after arbitrating and

awaiting the outcome and award before so inquiring or objecting. This is logical, reasonable, fair, and consistent with other basic and fundamental legal and practical concepts and practices of constructive or imputed knowledge, waiver, and implied consent.

In *Ilios Shipping, supra,* the objecting party knew prior to the arbitration that Mr. Ellison, the arbitrator, was in the insurance business and associated with a particular agency, and the party was held bound by the information he could have discovered upon inquiry concerning business relationships, namely that the arbitrator's insurance agency had had business relationships with an agent of the other party in the arbitration proceedings. The court stated in its holding,

> "However, even more important is the fact disclosed in the moving papers that respondent knew before the arbitration started that Mr. Ellison *was in the insurance business* and *associated with John F. Curry Agency, Inc. and that respondent could have inquired concerning the business relationship of his firm to any party interested in the arbitration. Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection.* See *San Carlo Opera Co. v. Conley,* D.C.S.D.N.Y. 1946, 72 F.Supp. 825, 833, affirmed 2 Cir., 1947, 163 F.2d 310." 148 F.Supp. 698, 700. (Emphasis added.)

Similarily in *Cross Properties, supra,* the court noted,

> "*The nature and magnitude of the real estate company* with which Spear [the arbitrator] was affiliated would make it most likely that at *one time or another there would be some contact with one of*

> *the largest department stores in the City of New York.*" 255 N.Y.S.2d 1014, 1016. (Emphasis added.)

In *Newburger v. Rose,* 240 N.Y.S. 436 (App. Div. 1930), aff'd 254 N.Y. 546 the court stated that the moving party waived its right to object to an arbitrator, holding,

> ". . . The right to take advantage . . . [of the claim of disqualification] was waived because, with knowledge of the facts, the respondent failed to make the timely objection . . . *It has not been shown that any facts bearing on his qualifications were withheld or were of such a nature that appellants could not, without reasonable diligence, have ascertained them before the arbitration.*" 240 N.Y.S. 436, 438-439. (Emphasis added.)

The court noted, in response to the objection that the arbitrator was biased because of his being a stockbroker, that this was information which "could have been discovered by reference to the telephone directory" (240 N.Y.S. 436, 438), implying that the party therefore had constructive notice, if not actual notice, and consequently the objection was waived.

There can be no question but that upon reasonable inquiry Petitioner could have easily learned of the business transactions between Foundation Engineering Company and Samford. It is indeed even difficult to imagine that Petitioner, a large and active painting subcontractor in Puerto Rico, having painting contracts with Samford alone totalling over $350,000.00, did not have actual knowledge that the most prominent or at least one of the several most prominent engineers, Mr. Capacete, and the engineering and testing firm in Puerto Rico, Foundation Engineering Company, had performed routine

testing services for Samford, as a large general contractor in Puerto Rico which had over $9,000,000.00 in construction work to be performed on the small Island of Puerto Rico.

Here Petitioner does not even deny having at least the equivalent information that the protesting parties had in *Ilios Shipping, Cross Properties* and *Newburger v. Rose*. The attorney for Petitioner, Mr. Romero, was a close personal friend of Mr. Capacete, as had been Mr. Romero's father, who was also an engineer. A. 146. It has not been, and cannot be, denied by Petitioner that it knew, as an active subcontractor on five separate large projects of Samford, that Samford was one of the principal active construction companies in Puerto Rico at the time preceding and during this controversy. A. 30-31. Mr. Romero knew of the position of Mr. Capacete in the field of engineering and of Mr. Capacete's type of business. A. 146. In spite of this knowledge of the significance of the construction-related businesses of Mr. Capacete and Samford and Petitioner on the Island of Puerto Rico, counsel for Petitioner did not perform the easy task of making inquiry of his friend, Mr. Capacete, concerning whether there had been any previous business relationships with Samford (A. 146), even though he personally talked to Mr. Capacete about possible qualified arbitrators for this very same arbitration proceeding (A. 145). Nor was inquiry made of Respondents or their attorneys.

In light of this unexplained, unusual, and inexcusable failure to make ordinary simple, and easy inquiry, surely Petitioner cannot morally, legally or equitably now be heard to argue that it did not waive its right to object to Mr. Capacete, with whom Petitioner talked and con-

ferred when arbitrators were being selected. As in *Ilios Shipping*, Petitioner's continued silence regarding Mr. Capacete until after it learned of the unfavorable award, although it had knowledge of these circumstances that would cause one reasonably to infer the possibility of business relations, must be held to constitute a waiver of any objection.

4. Public Policy Demands that the Award be Confirmed.

The Practical, Contractual Rule

The policy which strongly supports the validity and finality of arbitration awards is probably the single most important policy applicable to arbitration following enactment of the Federal Arbitration Act and the various state statutes. This policy has been often expressly recognized by this Court. See, *e.g., Prima Paint Corp. v. Flood & Conklin, supra,* and *Wilko v. Swan, supra.* The legislation had been required to reverse the common law rule which had viewed arbitration as usurping or intruding upon judicial jurisdiction. However, the demands of commercial trade and needs of industrial activity required a new method of deciding commercial disputes to supplement resort to the courts, if the contracting parties desired and agreed upon such method of resolving their differences in a binding way. A remedy was desired which would avoid the often critized delay and expense of litigation and, perhaps just as importantly, a remedy which could preserve the business relationships of parties by allowing for a more quick, final, and amicable resolution of the issues than was possible in the courts. This also would often be a means of resolving a dispute without a severance of the contractual relation. The creation of the remedy of arbitration may be likened to the creation of the equity court—in both instances the existing legal remedies had been found inadequate to meet the increasingly more complex needs of society and the new remedy of arbitration—voluntarily entered into by consenting adults, firms, and corporations—thus was created by necessity and the desires

of the business community. It is on the basis of this background that this Court must rule.[21]

Arbitration is, of course, inherently and simply a *contractual* remedy — parties to contracts adopt it as an agreed means of resolving their own disputes in lieu of resort to the courts. The cases reflect all types and methods of arbitration, use of a single arbitrator or a board of arbitrators, arbitrators selected sometimes by one or more of the parties, sometimes by a trade association, by architects, or the American Arbitration Association or others. Various different practices are followed in arbitration, some formal, much like a judicial proceeding, some wholly informal, very often without the use of attorneys.[22] A fundamental value of arbitration is reflected by this diversity and freedom of practice — parties are left free to decide how they desire to or believe they may best resolve their disputes, and then to incorporate the procedure they desire in their contracts.

It is submitted that for this Court to do anything other than confirm the award in this case would be to seriously undermine arbitration as a reliable remedy. To vacate the award, the Court would have to choose one of two possible grounds: (1) that there is a non-waivable (by the contracting parties) absolute "duty" (though not stated in the contract) of an arbitrator and/or a party to volunteer unsolicited information about past and remote business relationships concluded a con-

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[21]See generally, DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATIONS (1968), at 1-29; and Sarpy, *Arbitration as a Means of Reducing Court Congestion*, XLI Notre Dame Law. 182 (1965).

[22]Kellor ARBITRATION AND THE LEGAL PROFESSION (Pamphlet, Am. Arb. Assn., 1952 (?)).

siderable time prior to the arbitration, even though the contract procedure agreed to required no such disclosure and such past relationships admittedly had no effect on the arbitration, and that failure to comply with such not-agreed-to "duty" is "evident partiality" per se, or (2) that on review of the facts of this case, there was "evident partiality," although both the District Court and the Court of Appeals expressly found to the contrary, and again irrespective of the contract procedure agreed to by the parties involved and the fact that such relationship admittedly had no effect on the arbitration. The creation of either rule would destroy confidence in the finality of arbitration awards, and consequently, in the use of arbitration as a remedy. It would also unjustly destroy the work and efforts of the parties and arbitrators that produced the award which the Federal District Court found to be "fair and impartial."

In the first place, such a rule would be totally technical in nature, imposing a severe result, vacatur, even though the complaining party many times admitted and stipulated in open Federal District Court in the suit challenging the award that the relationship had no effect on the arbitrator involved. The rule would require arbitrators and/or parties to arbitrations to voluntarily do certain things not expressly provided for or required by statute, or by contract, such things as conducting an examination of all the relationships, contracts and dealings they or their family, company, or affiliates had had at some time personally or otherwise to determine if a relationship of some kind at some time existed, and if one of some unstated and uncertain kind were found to have existed at some un-

defined time, then to volunteer such information although it was not requested. Such a technical, and indefinite and undefinable rule has no place in a procedure which is supposedly free from such pitfalls, free from rules that only possibly attorneys would be aware of (if even they) when often attorneys are not used at all.[23] If the duty is placed on the arbitrator to volunteer on his own initiative that which no one requires or asks, since often the arbitrator will be a layman and will have no legal advisor, is there then also to be imposed a duty on a party who himself may or may not be represented by counsel to advise and instruct the arbitrator to volunteer such information to the other party? Does he do this privately or jointly with the other party? If privately, is it "fatal" not to disclose this relationship or contact?

There simply is no means in such a procedure to provide notice to participants who are consenting contracting parties of a rule that most certainly runs contrary to the assumptions of parties in adversary proceedings. One is not normally thought obliged to aid his opponent in the assertion or protection of rights where it is presumed the opponent is doing all that the opponent desires or feels is necessary in prosecution of his case. A party is not obligated to be advocate and adviser for both sides of a dispute. In short, if a party thinks information of a certain character is required, he is expected to reasonably and properly seek that information; absent an express requirement to provide the information, it would be contrary to customs and natural expectations to assume it would be unilaterally volun-

[23]See note 22, *supra.*

teered. It is respectfully submitted that the creation of any such rule should be only by clear and express legislative action, especially in view of the fact that not only is there a total absence of any evidence that Congress intended to impose such a technical rule in the Federal Arbitration Act, but the legislative history is replete with statements of the purpose of overcoming similar technical rules found in litigation.

To confirm the award would leave arbitration a matter of contract, made enforceable by statute and subject only to the express requirements of statute, including the requirement that there must not be "evident partiality," namely *actual* partiality. To require an absence of actual partiality would be a practical rule that all involved in arbitration would acknowledge as only reasonable and expected to be the rule that would apply. Such a rule would not be at variance with the rules, policies and practices of trade associations or the American Arbitration Association concerning disclosure, but would provide flexibility by allowing for adoption of such additional procedures and rules by contract as a part of the agreement to arbitrate as the contracting parties desired. The contracting parties could (as they may do now) require the volunteering of information about relationships, or, like the practice of the American Arbitration Association[24], the association itself could assume the responsibility for making inquiry of arbitrators concerning relationships. Confidence in the finality of awards would be justified so long as the contract arbitration pro-

[24] *The "Hazards" of Commercial Arbitration* (Editorial), 17 Arb. J. (n.s.) 65-66, 111-112 (quoting instructions from form sent by the Association to nominated arbitrators).

cedures were followed and there was no actual wrongdoing by an arbitrator.

Judges and Arbitrators

The argument has been suggested that arbitrators should be held to the same or similar standards as judges. R. XVI, 156 (4-11a); Br. of Pet., p. 31. Some few states require disqualification of judges, under certain conditions for the sake of appearances although the judge could act without bias. However, there are basic differences between the mandatory response to a court's summons and arbitration voluntarily agreed to as a method of resolving contract disputes. There is little reason to impose the same strictures on arbitrators. Judges are public officials holding office for various terms, sometimes for life; strong public interest requires even the avoidance of appearance of conflict of interest in order to promote confidence of the public in the individual judges and in the judicial system; the parties who come before judges have little choice in who will hear their case; it is most definitely awkward and difficult, if not at times impossible, for a party in judicial proceedings to inquire of the judges' relationships with another party; a judge, being professionally educated for and with experience in his position, can be expected to have complete knowledge of all requirements concerning his conduct, however technical those requirements may be.

On the other hand, an arbitrator serves for a short period of time to resolve a single dispute; the parties to an arbitration have the right to select their own arbitrator and a right to inquire and object, on valid grounds, to who the other arbitrators will be, and thus it can be said the parties have both control and private responsibil-

ity over who will decide the dispute; since the parties are doing the selecting, it is easy and to be expected for a party to make inquiry of the other party or the arbitrators concerning business relations, if such information is desired; unlike a judge, an arbitrator is not trained in the responsibilities and duties of being an arbitrator, but in fact may act as an arbitrator only on a single occasion with no prior experience or instruction, having only the agreement to arbitrate and possibly a statement of the questions or disputes he is to decide.

All of these differences require that arbitrators not be subjected to the same restrictions as judges. The lack of similarity between an arbitrator and a judge has been observed by the late Professor Wesley Sturges in discussing whether statutes disqualifying judges from serving where certain relationships exist should also be applied to arbitrators. Sturges discusses a case where an arbitrator was held not subject to the Alabama statute disqualifying a judge from serving where there was a familial relationship to one of the parties[25], and concludes that such statutes do not apply to arbitrators. Sturges at 369. Likewise, no similar restrictions should

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[25]COMMERCIAL ARBITRATIONS AND AWARDS (1930). Sturges quotes from *Davis v. Forshee*, 34 Ala. 107 (1859),

> "Parties may be drawn against their consent before judges, chancellors, county commissioners and justices of the peace; and usually they have little or no choice in the matter. They are officers appointed by the law, and suitors must submit to their orders. Arbitration, in this state, is never compulsory. Parties voluntarily elect this mode of adjustment, and appoint their own arbitrators. We know no reason why persons related to suitors within the fourth degree, may not, if chosen, act as arbitrators, and make a binding award." Sturges at 369.

be judicially created to formalize and limit the selection of arbitrators by the contracting parties.

Even if Professor Capacete *were* held to the strict standards imposed on a federal judge, he would still not have such an interest here as would disqualify him, for a judge is not disqualified by an interest which is past, not present;[26] nor is a federal judge whose interest is insubstantial required to disqualify himself.[27] Here, Professor Capacete had no interest in the outcome of the litigation and the casual, unrelated and insubstantial business relationships which had occurred had ceased a year or more earlier. Furthermore, the professional fees paid by Respondent Samford were only a small fraction of 1% of the incomes of the firms in which he had an interest, an amount which is obviously quite insubstantial.

Jurors and Arbitrators

Another comparison between litigation ad arbitration supports the conclusion that it is incumbent on a party to make inquiry about relationships if he is to make objections. The common practice in jury trials is to select jurors by *voir dire* examination, prospective jurors being dismissed for cause if a relationship is found upon examination by a party. It is necessary, however, that the party who wants to object to make or request the court to make the inquiry; otherwise, the party will be deemed to have conclusively waived any such objection by failing to make inquiry and objection before the prospective

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[26]30A Am.Jur., *Judges*, §102.

[27]28 USCA § 455; See *Lampert v. Hollis Music*, 105 F.Supp. 3, 5 (E.D.N.Y. 1952).

juror is allowed to become a member of the jury panel. It is not prejudicial to a party to make such inquiry and it is expected and required, or there is deemed to be irrebuttable consent or waiver.[28]

The policy in favor of finality, present even in litigation as an arbitration, requires that the doctrine of waiver apply when a party has failed to make relevant and prudent examination. It is no more an unusual proposition to expect – and the law require – parties in arbitrations to make the same such inquiry of prospective arbitrators, and even of the opposing parties (being an additional source of information) in order to entitle such parties to make objections or be forever barred by allowing the arbitrator to decide the dispute without having first so inquired.

Contracting Officers and Arbitrators

Comparison to a similar means of resolution of disputes reveals that there is nothing unreasonable, unfair or harsh in a rule which merely causes parties to comply with their own contractual agreement to arbitrate, and if the agreement does not call for or require any such disclosure, not to impose upon the parties such technical procedures by judicial construction, when if such had been desired it could easily have been included in the contract or, if not, easy inquiry made when the arbitrators were being selected.

In Goverment construction contracts, the disputes procedure has been likened to an "arbitral" process. *United States v. Wunderlich*, 342 U. S. 98, 72 S.Ct. 154, 96 L.ed. 113 (1951). Yet in this procedure the contracting officer who is an employee of the Government – one of the

[28]50 C.J.S. *Juries* §251. See *Knickerbocker Textile Corp. v. Leifer Mfg. Corp., supra*, 105 N.Y.S.2d 200, 201.

parties – and is the person principally responsible for performance of the Government's obligation under the contract is made also the decision-maker, or arbiter, of disputes. Here one of the party's own agents and employees, the Government's, is also the *sole* "arbitrator." The rationale supporting the fairness of this procedure is that this is what the parties agreed to in their contract. The judicial review of the determinations of disputes reached in this "arbitration" procedure of the Government agency was limited by this Court to the sole issue of whether the Government representative was guilty of *actually* fraudulent conduct. This reflects Federal law favoring strongly the policy of finality. *United States v. Wunderlich, supra.* After the passage of the Wunderlich Act, 41 USCA § 321-322, this Court continued a policy of supporting finality of such administrative "arbitration" decisions rendered under the contracts disputes clause by holding a party was not entitled to a de novo hearing in the Court of Claims on challenges under the Wunderlich Act. *United States v. Bianchi & Co.*, 373 U.S. 709, 83 S.Ct. 1409, 10 L.ed.2d 652 (1963).

In comparison to the contractual obligation to follow the procedure of the disputes clause, it cannot be said that there is anything less fair, moral, reasonable, equitable or practical in a rule which allows parties to select, by contract, a mode of arbitration procedure which is informal in nature, does not expressly or by adoption of rules of associations require the volunteering of information concerning relationships otherwise not elicited, and makes it incumbent on a party to ask for such information or otherwise be bound by the results of the arbitration, absent *actual* partiality, bias or fraud. The parties' agreement on an informal procedure places

them on equal terms under the agreement to object to arbitrators. However, the disputes procedure under Federal Government contracts quite clearly leaves the Government and a private party on somewhat less than equal terms where the same person who is the employee and agent for the Government (with the Government reserving the right to unilaterally replace him with a successor of the Government's own choosing) is also the judge or arbiter of disputes between the parties.[29] Is there any more reason to infer that in the case at bar Professor Capacete, who had only remote, unrelated, and very limited contacts occurring a year or more before the arbitration, was any less qualified to serve as a decision-maker under the agreement to arbitrate than a contracting officer who is directly, currently and actively involved as agent and employee of one party under a Government contract? It is submitted that, even more so than in the case of the contracting officer, the agreement as to resolution of disputes by arbitration should control, and since there was no agreement for the arbitrators or the parties to unilaterally volunteer information concerning past relationships, none should be judicially imposed, especially since such a conclusion would be entirely contrary to the understandings, assumptions and normal practices of parties in such adversary proceedings.

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[29]See criticism of this procedure, Braucher, *Arbitration Under Government Contracts,* 17 Law and Contemporary Problems 471 (1952) at 486-500, and Note, *Arbitration and Government Contracts,* 50 Yale L. Journ. 458, at 460-461, both articles suggesting that a form of arbitration by third parties would be a better remedy than under the "disputes" clause in Government construction contracts.

Consequences of this Court's Decision

To confirm the award will not impair any of the safeguards necessary to preserve the integrity of commercial arbitration as a useful and advantageous remedy voluntarily employed by contracting parties in lieu of litigation. The basic essential to arbitration insofar as the question of the relationships of the arbitrators is concerned is that there must not be *actual* partiality, bias or fraud. The rule that vacatur would result when *actual* wrongdoing is present would remain undisturbed because *actual* partiality is not an issue, but has been admitted by Petitioner not to be present, and the District Court and the Court of Appeals expressly found there was no partiality in fact and both courts commented that the evidence was clearly to the contrary (A. 185, 194).

With regard to any right which may be found to exist to object to an arbitrator because of the mere existence of some past relationship without reaching the issue of the effect of such relationship, it is respectfully submitted that for all of the foregoing policy reasons and on the basis of the relevant authorities discussed above, it is an obviously adequate protection of such right to cause the party who would or could object to make reasonable inquiry *before* arbitration and make any objections known at that time, rather than participate in the proceeding and await the award and then in retrospect seek to determine if there is some past relationship or defect which can be found to overturn an unfavorable award.

Any other rule would make arbitration unnecessarily hazardous, uncertain and impractical, placing obligations on the arbitrators and/or the parties of which they may

well not be aware or know how to define and perform since such a rule would be contrary to what one would naturally and customarily expect the obligation to be, namely not to volunteer unsolicited and undefined information, but to respond truthfully if inquiry is made. Such a technical rule would tend to foster and encourage not making inquiry until after the award, allowing a party to learn of the result before being obliged to determine if he had any objections to who he allowed to hear and decide the controversy, consequently causing an unnecessary waste of time, money and effort. Such a result would unfairly, unreasonably, and wrongfully reward indolence, carelessness, or trickery, while destroying the purpose and effectiveness of commercial arbitration.

For the Court to formulate a rule that calls for a new and independent review of the factual issues regarding the extent, nature, effect, and remoteness of past business relations between an arbitrator and a party to determine whether the relationship constituted "evident partiality" without any recognition of any responsibility of a party to reasonably inquire about such relations and irrespective of the admissions of the objecting party that there was no *actual* partiality or adverse effect on the award, it is respectfully submitted, would be to create an undesirable and unsound standard of appellate review; and most definitely so if in a third judicial review of the same facts in this case it is finally decided that there was "evident partiality," though the objecting party admitted the arbitrator was not guilty of any fraud or any other improper conduct. Such a rule would promote the making of every effort through use of the appeals procedure to find a court sympathetic to the position of the

losing party in arbitration proceedings, although no challenge is made of actual partiality or of effect of the relationship, a result that would virtually destroy confidence in the finality of proceedings where persons in the same or similar or related businesses are commonly used because of their special knowledge, experience, and skills and are likely to have had such past business relationships, just as was the case with Professor Capacete. Most clearly Congress did not intend to promote such use of the appeals procedure in Section 10 of the Federal Arbitration Act. Instead the standards of review of awards were obviously intended by Congress to be very conservative and limited, in the words of the draftsman, to the *"inherently vicious"* deviations from what is moral and fair. Joint Hearings, *supra*, at 36. (Emphasis added.)

Respondents therefore respectfully submit, (1) that the Court should not adopt a standard of review that requires a court to enter into a new and independent evaluation of the details and disputed circumstances of past business relationships where there is admittedly no actual partiality or wrongdoing on the part of the arbitrator and, consequently, no allegation that the award has been in any way affected, and (2) that if the Court nevertheless adopts a rule requiring a judicial review of the facts under the circumstances of the case at bar, the Court should confirm the award on the basis that there were adequate grounds and evidence for the District Court to conclude that there was no "evident partiality" on the part of Mr. Capacete for the reason that the trial court could properly conclude that the relationship was past, vague, remote, uncertain and insubstantial, and that the Court cannot find, as a matter of law,

that the decision of the District Court, as the trier of the facts, was erroneous.

In this case, the District Court viewed and had the opportunity to consider "all the evidence that was introduced" in the arbitration trial (A. 97) and to observe and hear the sworn testimony of the three arbitrators, as well as the testimony of Mr. Romero (A. 178), and the court reporter who recorded the arbitration proceedings on tape recorder, relevant portions of which were transcribed and submitted to the District Court as evidence. Also, the District Court observed and heard the attorneys of both parties make judicial admissions, concessions, and stipulations regarding the very issue now on appeal. By reason of the presumptions favoring the validity and correctness of a trial court's judgment and the reasons the appellate courts do not overturn the decisions of triers of fact who had the opportunity to evaluate credibility and analyze and observe the details, demeanor, and dynamics of the witnesses and the litigants, the arbitration award should be sustained and upheld by affirming the decision of the District Court that "the record shows that the arbitrators conducted fair, impartial hearings; that they reached a proper determination of the issues before them" (A. 185) and the decision of the Court of Appeals that "the court was well warranted in finding that there was no prejudice or bias in fact manifested in the course of the proceedings. Indeed, there was considerable evidence which negatived it" (A. 194).

Judge Learned Hand, in an otherwise neutral statement concerning the virtues of arbitration, succinctly summarized the important policies to be considered in

reviewing awards and, consequently, in developing the standards of review,

> "Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. *But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.*" *American Almond Prod. Co. v. Consolidated Pecan S. Co.*, 144 F.2d 448, 451 (2nd Cir. 1944). (Emphasis added.)

5. Petitioner's Self-Impeachment and Petitioner's Abuses of the Arbitration Process Totally Discredit and Nullify Petitioner's Attack on the Award.

In opening argument to the District Court in rebuttal of the unfounded arguments of counsel for Petitioner, counsel for Respondents stated:

> "I request as a privilege, the opportunity to . . . reply . . . . [to the] . . . implied accusation of impropriety or doubtful conduct. We desire to present sworn proof . . . the Court will know who is proper and who is improper, if anyone . . . We have some proof we would like to introduce. We deny categorically and completely not only what was expressly stated to this Court, but what was implied insofar as it reflected any impropriety with the selection of the arbitrators. Secondly, we believe we can establish that Commonwealth Coatings knew or should have known that Mr. Capacete had previously done some minor work." A. 80-81.

Respondents requested this privilege in the District Court. The incorrect and unwarranted accusations of the Petitioner have become increasingly serious, surprising and scandalous with each appeal.

"Fighting" finite men frequently fool themselves. However, as judges and others learn the facts not only about the fight but primarily about the "fighters," the finite men, they are seldom fooled. In an effort to respectfully assist the Court to unwrap the generalities of easy, incorrect and harsh allegations and discover the hard kernels of historical truths regarding who has wronged another and betrayed himself, a short summary of the history of these litigating parties is stated.

Petitioner Breached The Letter and Spirit of Its Agreements

The two corporations, both experienced contractors, in 1960 and 1961, executed five subcontracts for $351,938.00 worth of painting. A. 33.

Recognizing the need for prompt and binding settlement of disputes on construction contracts, where great damages can result from delay and disruption, these two contractors in their subcontracts agreed that if any dispute arose, each of them would immediately select an arbitrator and those two would select a third arbitrator and,

> "*The written decision of any two of this Board shall be final and binding* on both parties hereto . . . Provided, nothing contained herein shall excuse subcontractor from *completion of the work* in the manner provided in this contract nor shall the pendency of any dispute or arbitration proceeding excuse any delay, deficiency, default or noncompliance therewith." A. 47. (Emphasis added.)

Notwithstanding this contractual obligation to resolve disputes promptly by arbitration with no disruption of the work, Petitioner after being paid $209,502.49 (A. 34) in June and July, 1962, wrongfully abandoned all of its painting work without first demanding arbitration. A. 31, 34. Respondent Samford, immediately declared the painting subcontractor in default, demanded Petitioner resume work and resolve all disputes by arbitration. A. 31. Petitioner refused to complete its work, but did thereafter likewise demand arbitration (A. 31) and both parties agreed "all disputes, legal and factual, involving all five subcontracts" (A. 32) would be decided by a single arbitration board.

Petitioner next wrongfully breached the spirit and substance of this ratification of its earlier contractual obligation to resolve disputes by arbitration by filing two lawsuits in the Federal Court in Puerto Rico against Respondent Samford's sureties. The District Court stayed this litigation until the arbitration proceedings mutually demanded by the parties had been completed. R. I, 12; II, 60. Contrary to the clear contract language and the written ratification, made after abandonment of the work, to arbitrate their disputes, Petitioner resisted the stay, *"contending that the arbitration was not required,* but the Court stayed the lawsuits and recognized the arbitration proceedings mutually demanded and commenced. . . ." A. 32. (Emphasis added.)

The Arbitrators, The Parties and Mr. Capacete

The November 12, 1963 arbitration award expressly found and adjudicated:

> "Thereafter, this Board of Arbitration was constituted, composed of a full panel, including Dwight L. Chapman, appointed by Samford; and Hector Martinez Munoz, appointed by Commonwealth; and *Jose L. Capacete, the remaining and third arbitrator agreed upon by both parties and their appointed arbitrators.*
>
> *"The Board determined that its members have been duly and lawfully appointed and agreed upon to serve as arbitrators.* The Board further finds that the parties have agreed to cause all disputes, legal and factual, involving all five subcontracts to be decided by a consolidated and single arbitration board. . ." A. 32. (Emphasis added.)

Ten Days of Testimony

"The Board . . . conducted hearings and heard testimony for some ten days and heard final arguments of counsel for both parties on Tuesday, September 3, 1963. . . .

"Additionally, both parties agreed to submit briefs, with the right to respond to the briefs of the other, and with both entitled to submit a proposed award to the Board.

"The Board before making any one of these findings has fully considered and studied all of the evidence, each party's statement of issues, stipulations, and briefs, proposed award, and contentions of the parties, as well as the details of all of the many claims, counter-claims and all of the legal and factual disputes and questions existing between the parties regarding each and all of the said five subcontracts and projects." A. 33.

Breach of Stipulation to Exchange Documents

"Mr. Romero: And we will meet at . . . eight o'clock. Mr. Currie: Eight o'clock. Thank you." Transcription of Sunday, September 1, 1963, Arbitration Proceeding, P. 8; described in R. XVI, 159 (4-11).

This transcript analysis and other evidence filed with the Court reveals the clear, specific, and exact understanding made between the attorneys, with their clients participating, to meet at eight o'clock the next morning to exchange data on financial and construction cost estimates, gallons of paint, labor, dollars and cents they both desired from each other, but mutually understood ". . . we don't want to give you ours until we get yours."

Notwithstanding this solemn agreement, it was totally

breached, and Petitioner failed to appear, failed to provide the audits, the accounts payable of Petitioner and other data that Respondent had requested from the beginning of the arbitration. With understandable disappointment, Respondent's attorney stated:

> ". . . Mr. Chairman, I would like to make a report to the Board. It was our understanding . . . that we would conclude this hearing today in this fashion that the parties were going to meet here at eight o'clock this morning, and all of the exhibits that were intended to be introduced were going to be available and put out on the table for the other party to examine and the documents that the other party had been requesting we had said for some time that at the beginning of the hearing that we wanted them to put their information in an envelope and have it available before we showed ours. *We have been asking for audits, accounts payable and other data.*
>
> "The Samford people at great inconvenience stayed up late last night and were up at six this morning and we were here at eight o'clock. At 9:05 Commonwealth appeared *without their attorney* and *had no data to present* to us other than a sheet or two of paper saying this was their estimate for (*sic* - or) the original bid or some such information. We had all of this evidence that we now have here and our exhibits which we are now indexing to make a list of what's in all of it on the table ready and available for their inspection so that we would not be delayed and ask to see their's — they had none.
>
> "And, *so there was a total failure of that effort.* . . ." R. VI, 139 (2-4). (Emphasis added.)

The breach of this stipulated "legal fair play" procedure participated in and condoned by the owners, officers and representatives of Petitioner is further ex-

plained in the District Court's record. See A. 158, 160, 162, 166, 167, 174, 175, 177-180.

The legal and moral implications of breaking this expressed understanding for mutual examination of the exhibits and documentary evidence becomes even more serious and condemning of Petitioner who later before the District Court wrongfully and incorrectly alleged it had not had an opportunity to examine Respondent's evidence and documents. A. 174, 175.

Mr. Romero: So It's A Matter Of Credibility. A. 178.

Petitioner's pleading alleged a denial of the opportunity to examine Respondent's documents and evidence. Petitioner's attorney, Mr. Romero, testified under oath regarding the lack of such opportunity and further testified that he objected to the introduction of this evidence. The District Court recognized the great significance of Petitioner's sworn pleadings and testimony which had complained that ". . . the Arbitration Board against your [Petitioner's] objections considered these documents without giving you an opportunity to look at those documents and examine them. . . ." A. 177.

The Court stated:

> "Of course the evidence is contradictory. You [Mr. Romero] have testified one way and Mr. Chapman and Mr. Capacete and Mr. Martinez have testified the other way. The only piece of evidence we had in order to clarify the situation was this tape recorder. This tape recorder may show that you objected and they did not pay any attention to your objection." A. 177-178.

To the Court, Mr. Romero responded:

> "I testified under oath as to my objections. . . . So it is a matter of credibility." A. 178.

Then followed:

"The Court: The only thing to determine that would be the tape recording. . . .

"Mr. Romero: As of this moment I believe it is a matter of credibility. . . .

"The Court: If there is any piece of evidence still to be investigated that would turn the tide one way or the other it is better to have that.

"Mr. Romero: Definitely." A. 178-179.

The tapes of the arbitration proceedings were transcribed. They definitely revealed ample opportunity for inspection. They definitely revealed no objections. They definitely revealed that the testimony of arbitrators Chapman, Capacete, and Martinez Munoz was correct and true. They definitely discredited and impeached the Petitioner's sworn pleadings and allegations and the Petitioner's attorney's sworn testimony. These transcripts demonstrate who was proper and who was improper. They demonstrate that the District Court's decision is based upon truth and valid evidence and that Petitioner lost and rightfully lost, the judicial proposition it made the District Court, "So it's a matter of credibility." A. 178.

Fleeing From Cross Examination

From ". . . the beginning of the hearing . . . we have been asking for [Petitioner's] audits, accounts payable and other data" to show Petitioner was not timely paying for the paint and materials on the projects as expressly required by the subcontracts. R. VI, 139 (3).

Petitioner had refused to supply this information during the hearing and even on the last day breached its

solemn stipulation to meet at eight o'clock in the morning to allow examination of such information.

Respondent renewed the request for the information after the failure of the eight o'clock agreed meeting. R. VI, 139 (4). However, Petitioner continued to refuse to provide the accounts payable and debts due by Petitioner to suppliers of paint and material for these projects, which until paid would constitute claims against Respondent Samford's surety payment bonds. Petitioner claimed that the unpaid items "of $60,000.00 in materials . . . have been secured by notes from United Marcus [*sic* - Painting] and Marcus Decorating" (R. VI, 139 (7-8)), other large painting firms owned respectively by Abraham N. Stein and Arnold Marcus.

Mr. Marcus is Petitioner's President (A. 53), while Mr. Stein is its Secretary (A. 61). The giving of such notes was consistent with the indemnification by these other companies, United Painting and Marcus Decorating, of the obligations of Petitioner, Commonwealth Coatings Corporation, and the indemnification given for Petitioner to obtain surety bonds guaranteeing the performance of its subcontract from Maryland Casualty Company (A. 68, 130, 182) on such a large total painting subcontractor's obligation as $351,938.00. (A. 33).

Respondent Samford had contended that it did not know what the notes covered, but that in any event such notes and Petitioner's bond did not constitute payment of the suppliers as required by the subcontracts. Respondent continued to seek the information that Petitioner refused to supply, as clearly demonstrated by the following arbitration transcript:

"Mr. Romero: . . . It also shows . . . that United

Painting and Marcus Decorating were behind this, and it also shows that they were behind it so that this will be no reason at all for Samford to claim that they were afraid of any problem with Commonwealth Painting, because it had these two companies behind it. And also, when we will submit the bonds that we will make available that there were *indemnity agreements on those payment bonds by United Painting and Marcus Decorating.*

"Mr. Currie: The testimony of Mr. Samford indicated that there was a note dated June, 1962. We do not know when it was given or the circumstances or the conditions of it dealing only with one of the accounts, not with reference to the others, and *we do not accept that that situation met the requirements of the subcontract.* The Board knows of our request — knows that on a Sunday *we anticipated receiving audits* that Sunday evening or in any event on the following Monday morning and *we had not received them.* Rather than delay the trial or get involved in an argument about that *we will proceed and hopefully get it on cross-examination,* and ask for such appropriate time extensions as may be warranted because of failure to comply with the commitments as we understood them." R. VI, 139 (8-10). (Emphasis added.)

This background makes more reprehensible Petitioner's "concealment" as revealed by the following statement made by Respondents' attorney to the District Court, which Petitioner never denied:

"We could complain in the same vein of things that the three principals of Commonwealth Coatings and two of the main owners from New York, *Mr. Stein and Mr. Marcus, during the last portion of the hearing, did not show up, and that prevented us from the right of further cross examination which*

we wanted. When they voluntarily absented themselves from the hearing." A. 94. (Emphasis added.)

Petitioner's owners not only "did not show up" for the stipulated eight o'clock in the morning exchange of information and the evening hearing on the last day of the arbitration, which prevented Respondent's "right of further cross-examination which we wanted," but they "did not show up" and testify at any of the three hearings before the District Court on their several petitions attacking the arbitration award.

In fact, the only representative of Petitioner who testified in an effort to set aside the arbitration award was Petitioner's attorney, Mr. Romero, who was examined by Petitioner's New York attorney, Mr. Korngold. However, as already demonstrated, even this testimony of Mr. Romero was totally discredited and impeached.

Just these few instances of not only "failing to reveal" by breaching stipulations to provide information, followed by a complete absence from hearings that prevented cross-examination of Petitioner, not only make dubious the wisdom of Petitioner's charging Respondents with "concealment," but provide a history of consistent conduct that is best explained and interpreted by the familiar proverb:

"The guilty flee when no man pursueth,
While the innocent are as bold as a lion."

This judgment is especially justified when it is remembered that Petitioner requested to open the arbitration hearing by calling Respondent Samford's General Manager as an adverse witness and cross-examined the Samford personnel for hours. Also important, Sam-

ford had voluntarily answered discovery interrogatories propounded by Petitioner before the arbitration. The record explains this in detail:

> ". . . Commonwealth Coatings introduced the case, they *called Samford's vice president* and general manager, Mr. Dickinson, *as an adverse witness,* to start the case. Before the case started they filed a list of *discovery interrogatories* with the Board of Arbitrators and the Board of Arbitrators required Samford to answer all these interrogatories which provided the basis of proof.
>
> "Following that, they called as their first witness, Samford people. *They cross examined for hours.* They put their own proof on for hours." A. 98. (Emphasis added.)

Violation Of The Letter and Spirit Of Solemn Stipulations

Petitioner's designated arbitrator, attorney Mr. Martinez, described the arbitration hearings:

> ". . . they were lengthy hearings and were held most of the time during the week ends, and particularly that long week end, Labor Day, we worked Saturday, Sunday, Monday and so we were all tired . . .
>
> ". . . the week end had already gone and everything had been lost so far as my family and I guess the rest of the members were concerned.
>
> "The Court: So it was the 'Lost Week End'?
>
> "A. A lost week end. There wasn't anything further to lose and it was a case that we could have stayed longer if the parties had chosen to or asked us to." A. 160.

As an accommodation to the parties who were busy,

the arbitrators conducted hearings on Saturday, Sunday, and a holiday, Labor Day. Petitioner's officers, Mr. Stein and Mr. Marcus, were anxious for the arbitration to be concluded so that they could return to New York. A. 94.

The parties and their attorneys expressly stipulated and requested the arbitrators to expedite the conclusion and to conduct the hearings on all of these days.

During the hearings, Petitioner admitted this, for example:

> "Mr. Romero: . . . we must admit and will admit that it was stipulated by the parties that the hearings could be held on Sunday." A. 90.

Even though Petitioner's owners and officers, Mr. Marcus, President, of New York; Mr. Nieto, Vice President and General Manager, of Puerto Rico; and Mr. Stein, Secretary, of New York, together with their attorney, Mr. Romero, expressly stipulated, participated therein, and induced the arbitrators and Respondent Samford to believe all of them would, by law, morality and honor of agreements so solemnly made and relied upon, be forever estopped through simple honesty, fair dealing, and honorable motivation to accept the results of arbitration according to rules made and agreed to by Petitioner, Petitioner nevertheless shockingly charged that the arbitration was illegal and unlawful and the award null and void because hearings were held on Sundays and Labor Day. (See February 5, 1964 Motion to Vacate Award filed by Petitioner's Attorney, Mr. Romero, (A. 39); the sworn February 1, 1964 Petition to Vacate Award by Petitioner's President, Mr. Marcus, (A. 52); May 6, 1965 Motion to Vacate Arbitration Award filed by Petitioner's Attorney, Mr. Romero, (A. 56); and

May 6, 1965 Petition to Vacate Award by Petitioner's Secretary, Mr. Stein, (A. 60).

Even more shocking and surprising was the effort by all of these owners and representatives of Petitioner to repudiate and dishonor the solemn stipulation and agreement made in open arbitration hearings which "expressly waived all time limitation requirements for the Board to make a determination and award and expressly agreed that no time limitations or restriction would apply or limit the Board's authority." A. 33.

The conduct and character of Petitioner as displayed by the following excerpts from the record are most relevant as the Court evaluates credibility of the parties, reviews the judgment of the District Court, and determines ". . . who is proper and who is improper, if anyone . . ." A. 80.

> "Mr. Currie: With reference to the thirty days we would submit this Court had already ruled when it granted the stay of the surety cases, the two cases against the sureties, this Court ruled that the stay was warranted and mandatory because of the Federal Arbitration Act and in at least two or three places in the pleadings of Commonwealth, they have stated that this Court has jurisdiction to review this award because it is under the Federal Arbitration Act.
>
> "One, the Federal Arbitration Act preempts the (14) feel [*sic*—field and] that there is no thirty day requirement there [as there is in the Puerto Rico Arbitration Act] and that's no ground for challenging the award under the proceeding in which this arbitration was conducted.
>
> "Two, Mr. Romero and all the parties *in the presence of Commonwealth Coatings' owners,* when Mr.

Marcus, Mr. Stein and Mr. Nieto, owners of Commonwealth were sitting in the room and when the question came up regarding when must the arbitrators decide and must we have a written stipulation to extend it beyond thirty days, *Mr. Romero stated such was not necessary,* no writing was required as *we stipulated in open arbitration.*

"Mr. Hector Martinez agreed with that and then Mr. Ramirez acquiesced and agreed.

"Mr. Romero: *I admitted that already.*

"The Court: He admits that. *He says it is his client* that does not want them to withdraw that claim." A. 94-95. (Emphasis added.)

The background for the Court's response to the admission of Mr. Romero is further recorded, and is more revealing, and seriously condemning of Petitioner:

"[Mr. Romero]: Then, Your Honor, we have also alleged by the supplemental motion, that these hearings were held Sunday contrary to law. As to that we must admit and will admit that it was *stipulated* by the parties that the hearings could be held on Sunday. It is also alleged in the supplemental motion —

"The Court: We have no blue sky laws.

"Mr. Romero: Also that the award took over thirty days and there wasn't a signed stipulation that the award be entered after thirty days, but there was an oral *stipulation.*

"The Court: *So you are withdrawing that charge?*

"Mr. Romero: *The supplemental motion was filed by the client himself. I am not withdrawing it.*

"The Court: *Why don't you ask your client for permission to withdraw it?*

"Mr. Romero: *They don't want the allegation withdrawn,* because *even though it was agreed to verbally,* the law does not permit this to be agreed to verbally.

"The Court: *That's Commonwealth Coatings.*" A. 90. (Emphasis added.)

The record reveals that each of the motions and petitions to annul and vacate the award, filed separately by Mr. Romero, Mr. Steih, and Mr. Marcus, each declared the award was illegal and void because not rendered within thirty days. However, none of these four pleadings challenging the award had the candor and fairness to recite and reveal that Petitioner was the party inducing the stipulation to waive the requirement of the Puerto Rican Arbitration Act that a final award be rendered within thirty days of the hearing. A. 39, 52, 56, 60.

The Many "Credibility Gaps" of Petitioner

The above self-impeaching and self-discrediting conduct of Petitioner and its representatives are sufficient to show the absence of clean hands, to destroy confidence and credibility in its pleadings and "proof," and to annul and warrant dismissal of its exaggerated, unjustified and unfounded attacks on the arbitration process and award. However, a summary view of a few of the many other self-betraying activities of Petitioner are outlined below:

1. Though the discredited pleadings charged partiality, all evidence and the many judicial stipulations and admissions made by Petitioner to the District Court expressly denied such, for example:

"[Mr. Romero:] Now, we don't mean to say that we believe that the chairman acted improperly in any way . . ." A. 75.

> "[Mr. Korngold, New York counsel for Petitioner]: I would like the record clear that at no time is Mr. Romero or myself accusing any of the arbitrators with doing anything fraudulent." R. IV, 137 (2).

There were many other such formal judicial admissions and stipulations made to the federal trial judge which, without contradiction, warranted and required the finding of the District Court:

> "With respect to No. 3, alleged partiality, bias or fraud of one of the arbitrators, counsel for plaintiff disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved." A. 185.

2. Many of the allegations of the various Petitions and Motions of Petitioner to annul the award are contradicted and discredited by Petitioner's own evidence. For example, the sworn February 1, 1964 Petition filed by Petitioner's President, Mr. Marcus, states:

> "Petitioner did its utmost to obtain arbitration with Samford and was utterly stymied." A. 47.

As the official record of the arbitration proceedings reveal, it was not until after the federal court stayed Petitioner's lawsuits against Respondent Samford's sureties until the arbitration could be completed that Petitioner designated on March 25, 1963 an arbitrator who was willing to serve, attorney Aaron Holman, who thereafter died and was replaced by attorney Hector Martinez Munoz.

3. Though Petitioner claimed that United Painting and Marcus Decorating, other painting companies owned respectively by Messrs. Stein and Marcus, were "behind"

Petitioner and indemnifying Petitioner's obligations, and Respondent Samford should not be concerned about Petitioner's debts because Petitioner provided a surety bond. R. VI, 139 (4, 7, 8); A. 68, 130, 182. Petitioner has wrongfully failed and refused to pay any portion of the Court Reporter's charges, though Petitioner contracted for and engaged the court reporter (A. 98), and the arbitration award found that the parties had agreed that the court reporter's fees of $2,000.00 were reasonable and each should be assessed with and ordered to pay one-half thereof. A. 34. Equally bad is the default and the failure of Petitioner to pay any portion of the arbitration cost and arbitrators' fees which were reasonably fixed at $3,000.00 for each arbitrator, with each party ordered, pursuant to the subcontract agreement, to pay one-half thereof. A. 35, 130.

4. During the arbitration, Petitioner was so inconsistent that a document entitled "Abstract of Chart of Commonwealth Coatings Inconsistent Claims" analyzing the Petitioner's various bills and exhibits was submitted in evidence. R. VI, 139 (17).

5. The combined price for Petitioner's five subcontracts was $351,938.00. Before abandoning the work, Petitioner had been paid $209,502.49, leaving an unpaid balance for unfinished work of $142,435.51. The Arbitration Board found that Respondent Samford's reasonable expense to complete Petitioner's work was $158,307.86. Thus, after subtracting the unpaid balance, there was an award to Respondent Samford of $15,872.35. This is most significant, for the arbitration proceedings reveal that the total of Petitioner's bid for these five subcontracts "was approximately . . . . $100,000.00 less than the average bid cost" of the other bidders. R. VI, 139

(17). This provides an economic explanation why Petitioner was anxious to attempt to find some way to abandon the work. R. VI, 139 (17). This also explains Respondent Samford's concern about Petitioner's failure to pay materialmen for paint on the projects, which default according to Samford's testimony was already some $60,000.00. R. VI, 139 (7).

6. Petitioner, the only subcontractor to abandon its work on these projects, even though paid $209,502.49, left many claims and debts for the materials for the projects unpaid, contrary to the subcontract. (R. VI, 139 (7, 13, 14)), but worse ". . . Commonwealth made incorrect statements [to Samford] that payment to suppliers had been made." R. III, 116 (6, 7).

7. And of great importance:

> ". . . Commonwealth breached the subcontracts, not Samford by performing poorly and not in accordance with the subcontracts, doing such things as painting buildings the wrong color and failing to paint in the more difficult areas, such as behind the bushes, falling behind schedule, not having enough workmen on the jobs, not timely paying their suppliers as required by the subcontract, and finally completely abandoning the work on all five projects." R. III, 116 (6)."

The Ultimate Issue And The Ultimate Credibility Gap

Petitioner made two additional attacks on the arbitration award in their discredited pleadings, statements and testimony of Petitioner's attorney, Mr. Romero, namely that Mr. Capacete "never disclosed to Petitioner" the prior business relationship with Samford

and that the Board of Arbitration over Mr. Romero's objection allowed Respondent Samford to introduce evidence on the last day without giving Petitioner the right to examine or rebut the evidence.

Respondent's sworn pleadings denied that the terminated prior and unrelated testing services rendered by Mr. Capacete's firm disqualified him or affected the validity of the award, denied all allegations of fraud, and charged that Mr. Capacete "was totally fair and impartial in conducting the arbitration proceedings," and that Petitioner "before the arbitration proceedings and in any event before the Award of the arbitrators knew and should have known of the previous professional services rendered . . ." by Mr. Capacete's firm as an independent contractor. A. 65-66. Respondent also denied all allegations regarding any prejudicial error committed by the arbitrators in the admission of evidence in conducting the arbitration hearings. A. 69.

In none of the three separate hearings before the federal trial judge on the motions and petitions of Petitioner to vacate the award did the Petitioner or anyone introduce any evidence that Mr. Capacete had been guilty of fraud, partiality or other misconduct, but to the contrary, there were many and continual judicial stipulations and admissions, made in open court to the trial judge, that such had not occurred, that such was not even charged and, in fact, Mr. Capacete was not guilty of any such misconduct.

The record reveals that during the hearings the District Court would consider various issues and that Respondents, from time to time, indicated the desire to present sworn proof and testimony establishing there

was no impropriety in the selection of the arbitrators and that Petitioner "knew or should have known that Mr. Capacete had done some minor work." A. 80, 81, 82.

However, the District Court, apparently relying upon the judicial stipulations and admissions disclaiming "any imputation of bias, partiality or fraud on the part of the arbitrator involved" (A. 185), and believed that Petitioner was no longer relying upon this allegation in its effort to vacate the award, but rather relying upon the single issue raised by Petitioner's claim that the arbitrators on the last day of the hearing admitted evidence over Petitioner's objection without giving Petitioner the opportunity to examine and rebut such evidence. Such became the understanding of the third and final hearing on February 14, 1966 before the District Court.

Respondents had brought all exhibits that were introduced in the arbitration trial and had the three arbitrators present (A. 93) to establish that the Board had relied upon Petitioner's designated arbitrator, a lawyer, for legal advice (A. 92, 144, 155, 157) and that Petitioner had not objected to the evidence and had not requested additional opportunity to examine the documents, extend the hearings, or cross examine Respondent Samford, but in fact had breached the stipulation to meet at eight o'clock in the morning on the last day of the hearing to mutually inspect and examine the very evidence and documents Petitioner complained it had no opportunity to inspect.

The Only Issue

"The Court: That still does not answer *Mr. Romero's allegation that they were deprived of examining those documents,* of the necessary time to come to the Arbitration Board with evidence to rebut those documents or explain those documents. That's what he says, and *that's what the Court is interested in.*

"Mr. Currie: We would respectfully disagree. We state there was ample and total opportunity. There was no objection, no request for additional time, and they did have full privilege to examine everything and cross (20) examine and we are ready to submit proof and if that's *the only issue before the Court I will not address myself further.*

"The Court: *I believe that's the only issue at this hearing.*

"Mr. Romero: If that's *the only issue* the Court will hear I will change my order and call as my first witness Mr. Dwight Chapman." A. 98-99. (Emphasis added.)

The three arbitrators then testified and established that Petitioner had made no objection, made no request for additional time, and Petitioner had ample opportunity to examine and rebut the documents and conduct cross examination. The testimony of the attorney designated by Petitioner as arbitrator, Mr. Martinez Munoz, clearly establishes not only arbitration due process, but that even under technical legal rules of procedure, Petitioner had been afforded a fair hearing and complete procedural due process. A. 153-163.

Mr. Romero's sworn testimony claimed otherwise and in his statements to the Court said, *"So it is a matter of credibility."* A. 178. (Emphasis added.)

The Federal Judge stated, ". . . there have been no charges as to the honesty, ability, or anything like that . . ." of the arbitrators. A. 174. Later, the Court added ". . . *the only question pending*" (A. 175) (emphasis added), involved Petitioner's claim of lack of opportunity to examine the documents and rebut them.

Thereafter, the District Court again stated that this was *"The only issue that is important to me . . ."* A. 177. (Emphasis added.) The District Court and the attorneys for both sides agreed to cause the arbitration hearing record made on the tape recorder to be transcribed so the court could resolve the disputed testimony, the "credibility" issue, and know whether or not Petitioner had objected or been denied the right of examination and cross examination. A. 178-179.

With this understanding and agreement between the court and the parties, the court announced:

> "The Court: If the tape recorder supports your case then I am going to rule that the award be sent back to the arbitrators." A. 179.

". . . it is almost five o'clock" (A. 179), the hearing by its understood nature and evolved purpose had come to its end and dealt with the only issue before the District Court. Mr. Korngold, Petitioner's New York attorney, now knowing that the very voices from the arbitration hearing would be transcribed and that the "So it is a matter of credibility" (A. 178) proposition made by Mr. Romero could well be lost, was surprised and, contrary to the whole tenor and understanding of what was the remaining issue relied upon by the Petitioner, namely Petitioner's claim that it had objected and been

denied the right of examining the documents and cross examining, then stated as follows:

"Mr. Korngold: I have one other issue.

"The Court: And where it appears that Mr. Romero objected, what was the ruling, what happened, and of course Mr. Romero will read that and if he is not satisfied, he may have the tape played back so he may be sure that what the reporter has transcribed is the truth of what appears on the tapes and then on that basis I will rule on that question and then you may be able to cite this other case and if I am wrong in any of the rulings I have made there is still time for me to correct any such rulings, but at this time I don't believe that we will gain anything by hearing the cases you are going to cite.

"Mr. Korngold: It is on a completely different point, Your Honor.

"The Court: Why did you not raise that different point when I said the only issue here is this?" A. 179, 180. (Emphasis added.)

Respondent respectfully submits that this is another example of Petitioner's violation of the letter and spirit of the understanding of what was "the issue before the Court." Respondent had relied on this understanding in its presentation of proof and examination of witnesses. However, notwithstanding this further disappointing departure of Petitioner from the understanding, the record and evidence, under the law, demonstrate that Petitioner's appeal is without merit in law or facts and that the judgment of the District Court upholding the award should be sustained.

The manifest correctness of this conclusion was espe-

cially affirmed when the District Court, after reading the transcript of the arbitration hearing tapes, found that Petitioner had made no objection to the admission of the exhibits and had not requested any time extension, as had been claimed by Petitioner. A. 185.

CONCLUSION

Respondents respectfully submit that the findings of fact and judgments of law as reflected in the following paragraph from the District Court's opinion sustaining the award are manifestly correct:

> "With respect to No. 3, alleged partiality, bias or fraud of one of the arbitrators, counsel for plaintiff disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved. He seeks to overthrow the award on the ground that Samford should have informed plaintiff that the engineering firm with which the arbitrator involved (who had been selected by the two arbitrators designated by the parties) was connected had in the past done work for Samford. In view of the fact that, not only has plaintiff failed to offer any evidence showing "evident partiality" in said arbitrator (9 U.S.C. Sec. 10(b)), it also has expressly disclaimed any such imputation, this objection to the award must be, and is hereby overruled. See: *Ilios Shipping and Trading Corp., S.A., Petitioner, and American Anthracite & Bituminous Coal Corp., Respondent,* 148 F.Supp. 698, and cases cited therein." A. 185.

This finding of fact and judgment is manifestly correct and required because:

1. Throughout the trial and hearing, Petitioner's attorneys, both from Puerto Rico and New York, did continually make many judicial admissions and stipulations that "disclaimed any imputation of bias, partiality or fraud on the part of the arbitrator involved." For example, Petitioner's attorney stated, "Now, we don't mean to say that we believe that the chairman acted improperly in any way. . . ." A. 75.

Petitioner's effort ". . . to overthrow the award on the ground that Samford should have informed Plaintiff [Petitioner] that the engineering firm with which the arbitrator involved was connected had in the past done work for Samford" (A. 185) is a finding that was judicially admitted by Petitioner's Puerto Rico and New York counsel when, during the hearing, they told the Court:

> "Mr. Romero: Just one thing, this isn't an allegation of fraud against the arbitrators, but against Samford Company. They failed to disclose certain business relations with one of the arbitrators.
>
> Mr. Korngold: (Argued). Could we have the minutes taken? I would like the record clear that at no time is Mr. Romero or myself accusing any of the arbitrators with doing anything fraudulent. If the arbitrators are not told what their duties are by the people who select them, then they are not in fraud. They are innocent babes in the woods sometimes, and they were used, they may look that they have done something wrong. . ." R. IV, 137 (2, 3).

2. This alleged charge against Respondent Samford is without factual or legal merit because the court found,

> ". . . not only has plaintiff failed to offer any evidence showing "evident partiality" in said arbitrator (9 U.S.C. Sec. 10 (b)), it also has expressly disclaimed any such imputation, this objection to the award must be, and is hereby overruled." A. 85.

3. The evidence and allegations regarding the past, unrelated and remote testing services rendered a year or more before the arbitration established that Mr. Capacete was never the employee or agent of Respondent Samford, that such services were those of his firm

as an independent contractor performed on an occasional and isolated basis for the customary charges, and were in no way connected with, but completely terminated a year or more before the arbitration and thus such past relationship, because it was remote, insubstantial, unrelated and otherwise because of its nature as described in the record, does not constitute a disqualifying relationship, and the circumstances surrounding the past and terminated relationship do not establish evident partiality.

4. The arbitration agreement between the parties did not by its terms or references to other arbitration rules require either an arbitrator or either party to voluntarily disclose unsolicited information regarding such past, terminated and unrelated business connections.

5. Unless the parties otherwise agree, the law imposes no duty upon one party to voluntarily disclose unsolicited information regarding the qualifications of judges, jurors, or arbitrators, or such past, terminated, and unrelated business connections.

6. Such past, terminated and unrelated business relationships do not disqualify a judge, juror, or arbitrator. Even if Mr. Capacete were held to the strict standards imposed on a federal judge, he would still not have such an interest here as would disqualify him, for a judge is not disqualified by an interest that is past, not present; nor is a federal judge whose interest is insubstantial required to disqualify himself. Here, Mr. Capacete had no present interest in the outcome of the arbitration, all business relationships with any parties having ceased a year or more earlier. Also, the business relationship was never other than insubstantial, being less than a small

fraction of 1% of the incomes of the firms in which he had an interest.

7. The past relationship that existed between Mr. Capacete's firm and Respondent Samford would not have disqualified a juror. Failure to exercise due diligence in ascertaining the qualifications and failure to object at the time a juror is selected, constitutes a conclusive waiver if the basis of the objection is known or might have been known or discovered through the exercise of reasonable diligence, or the party is otherwise chargeable with knowledge of the grounds of the objection. The public policy for this rule is especially applicable to arbitration since the parties are free to prescribe the rules of selecting arbitrators, inquire about and waive disqualifications, and if disqualifications are alleged and not waived, to seek the removal of the alleged disqualified arbitrator by an action in equity before the arbitration hearings commence.

8. The volume and significance of Respondent Samford's construction business and Mr. Capacete's firm's engineering and testing services for the construction industry on the island of Puerto Rico which is only about 100 miles long and about 35 miles wide, were such that the Petitioner as a painting contractor, because of the magnitude and volume of its construction activities in Puerto Rico and the volume of business and construction contacts with Respondent Samford, necessarily knew or reasonably should have known of the past business relationship between these firms or probability of such relationship, that thus, Petitioner, under the law and facts, had actual or constructive knowledge of the past relationships. This conclu-

sion is especially warranted in this case because of the close personal friendship, relationship and contacts between Petitioner's attorney and Mr. Capacete, including knowledge of Mr. Capacete's business. It is further justified because Petitioner, a large and experienced painting contractor, knew or should have known that the testing services for sand and concrete, both heavy materials, and tests for soil compactions were, with almost predictable certainty, performed by a Puerto Rican testing firm such as Mr. Capacete's rather than by the uneconomic shipping of such heavy materials from the island or having other experts travel to Puerto Rico to make such tests.

9. Petitioner, with its many able Puerto Rican and New York attorneys, and experienced construction management, voluntarily elected not to inquire of the arbitrator or its adversary or to conduct such reasonable investigation that would have revealed the past and unrelated testing services performed by Mr. Capacete's firm for Respondent Samford. Thus, Petitioner is deemed to have known or have had constructive knowledge of all facts it desired to know to select and authorize Mr. Capacete to serve as arbitrator and, in failing to exercise reasonable diligence and to make reasonable inquiry, is deemed to have conclusively waived any objection that was known or might have been known or discovered through the exercise of reasonable diligence.

10. Petitioner demonstrated a total lack of ordinary diligence and due care. Both parties and Mr. Capacete were located in the San Juan area. All were professionally involved in the construction industry. Petitioner's attorney and Mr. Capacete were close friends, and there

was continuous and easy opportunity by telephone, letter, or otherwise to inquire of Respondent Samford, Mr. Capacete, or others knowing of the past relationships. In particular, there was lack of due diligence, resulting constructive knowledge and waiver, since the record reveals personal contacts and conversations between Petitioner's attorney, Mr. Romero, and Mr. Capacete (A. 145), when Mr. Romero conferred with Mr. Capacete seeking the names of lawyers who might replace Mr. Holman as arbitrator. Also, easy inquiry could have been made at the pre-trial hearing conducted prior to the arbitration hearing of testimony. All parties and arbitrators were present at the pre-trials. A. 88. Petitioner could easily have included such inquiry in the questions of its pre-hearing discovery interrogatories. A. 98. Neither did the Petitioner make such inquiry in the many letters and communications exchanged between the parties. Since ordinary diligence and easy inquiry would have revealed the past relationships, knowledge thereof is imputed to Petitioner.

11. Petitioner has waived any duty (which Respondents deny exists) of Mr. Capacete to inform Petitioner of the past and terminated business relationships between his firm and Respondent Samford because it was stipulated and judicially admitted that Mr. Capacete did not act "improperly in any way," but rather Petitioner attempted to "excuse" itself and to "place" a duty on its adversary to reveal such past, terminated and insubstantial relationships which under law are not disqualifying. The law imposes no such duty upon the adversary, but rather requires the complaining party to exercise due diligence in learning and asking and seeking information

regarding qualifications, objections to which it does not wish to waive.

12. Petitioner waived any objection it might have made to Mr. Capacete not only when he was originally selected and allowed to serve as arbitrator, but when the Petitioner with knowledge of the past relationship submitted to Mr. Capacete and the same Arbitration Board Petitioner's request for further and additional reconsideration of its award, A. 129, 131; R. V, 138 (35).

13. Not only were the past business relations terminated, but there was no possibility that future business relations would occur between Mr. Capacete and Respondent Samford.

> "Samford had not contracted for major projects in Puerto Rico for some two or three years before the arbitration hearing and was at that time arranging to close such operations in Puerto Rico." R. III, 116 (6).

14. The facts, the issues, the circumstances, the procedures, and the findings and the award of the Arbitration Board in no way suggest bias, fraud, partiality or misconduct in the proceedings and therefore do not support a finding of "evident partiality," but demonstrate that a finding of "evident partiality" would be unfounded, unwarranted, and contrary to the undisputed evidence which caused the District Court to find and state,

> "In closing, I wish to state that the record shows that the arbitrators conducted fair, impartial hearings; that they reached a proper determination of the issues before them. . ." A. 185.

Accordingly, Respondents respectfully conclude (a)

that the arbitrators were not required to have had no previous business relationship whatsoever with any party to be eligible to participate as arbitrators; (b) that Mr. Capacete and Respondents were not required to volunteer unsolicited information concerning the previous business relations between Samford and Foundation Engineering Company, especially since no one at the time of the arbitration proceedings or since has made any allegation that Mr. Capacete was actually anything other than totally fair and impartial in carrying out his duties as an arbitrator; (c) that Petitioner's failure to show, or even allege, any adverse effect on the arbitration proceedings or on the award caused by the purely isolated, casual, insubstantial and past business transactions which had occurred from time to time with Samford indicates that Petitioner's objection is wholly theoretical and technical in nature; (d) that in any event, Foundation Engineering Company's relationship with Samford was totally remote and insignificant and had been terminated, and Mr. Capacete's relationship was even less significant, Mr. Capacete being only a part owner of the firm and personally involved in only a small portion of the services; and (e) that if Petitioner had any right to object to Mr. Capacete, which is denied, it waived such right by its failure to inquire or object while having knowledge of facts as a subcontractor sufficient to cause Petitioner to conclude that Foundation Engineering Company and Respondent Samford may have had previous business relations since they were both engaged in related businesses and were both prominent in their respective fields.

For these reasons, the exhaustive effort of all concerned to resolve this dispute that included ten days of hearings, a multitude of exhibits, lengthy briefs filed

by both parties, tremendous expense, and the services of three well-known and highly qualified professional men as arbitrators should not now be totally undone upon the basis of the highly technical legal theory asserted by Petitioner unsupported by any relevant legal authority or any persuasive public policy.

Arbitration is a proceeding that is supposed to be informal and without unnecessary pitfalls for reversible error. The Second Circuit has stated,

> "It goes without saying that there should be great hesitation in upsetting an arbitration award. The award . . . must stand unless it is made abundantly clear that it was obtained through corruption, fraud, or undue means." *Karppinen, supra,* 187 F.2d 32, 34.

There has been not even an allegation of actual "corruption, fraud or undue means" in the rendering of the arbitration award. Surely, it would be an empty, costly and unwarranted burden to cause a rehearing of this dispute when there is a virtual admission that the result should again be the same.

Petitioner has argued in the District Court that the award was void because it was issued more than thirty days after the close of the hearings (A. 184), although Petitioner had expressly agreed to allow the arbitrators all the time they required for decision (A. 33). Petitioner had argued the award was void because of the holding of hearings on Sundays and a holiday (A. 184), although it had desired and agreed to this scheduling of hearings (A. 67-68). Likewise, Petitioner now argues the award should be vacated although it does not even claim that the arbitrators, the arbitration proceedings or the award were actually affected in any way by the circumstances

now complained about. The only conclusion that can be drawn, as was drawn by the District Court (A. 185-186), is that this is,

> "... a situation where the losing party to an arbitration is now clutching at straws in an attempt to avoid the results of the arbitration to which it became a party [Quoting from *Ilios Shipping, supra,* 148 F.Supp. 698, 700]."

It is therefore respectfully submitted that the decision of the Court of Appeals should be affirmed, thereby confirming the award of the Board of Arbitration, with costs assessed against Petitioner.

This 13th day of June 1968.

LUTHER P. HOUSE, JR.
Attorney for Respondents
1405 Fulton National Bank Building
Atlanta, Georgia 30303
Telephone 404-521-3800

FEDERICO RAMIREZ ROS
208 First Federal Building
Stop 23, Ponce de Leon Avenue
Santurce, San Juan, Puerto Rico

OVERTON A. CURRIE
EDWARD H. WASSON, JR.
1405 Fulton National Bank Building
Atlanta, Georgia 30303
On the Brief

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OCTOBER TERM, 1968

No. 14

COMMONWEALTH COATINGS CORPORATION,

Petitioner,

—v.—

CONTINENTAL CASUALTY COMPANY, FIREMAN'S FUND INSURANCE COMPANY and A. C. SAMFORD OVERSEAS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

EMANUEL HARRIS
Attorney for Petitioner
30 Vesey Street
New York, New York 10007
Telephone (212) 267-5700

EMANUEL HARRIS
MAX E. GREENBERG
SAYWARD MAZUR
On the Brief

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OTHER AUTHORITY:

Webster's Encyclopedia Dictionary 13

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

Errors, Omissions and Misstatements in Respondents' Brief

1.

On page 39 of respondents' brief in the statement of petitioner's counsel with reference to the challenge to the award, respondents fail to include the portion of the statement which is italicized as follows:

> " . . . this isn't an allegation of fraud against the arbitrators, *but against Samford Company. They failed to disclose certain business relations with one of the arbitrators*" (R. IV, 137 (2)). (Italics ours.)

2.

On pages 130 and 133 of respondents' brief, in an attempt to show a "credibility gap" of petitioner, there is stated as though it were evidence instead of merely an extract from a statement of respondents' counsel, petitioner's alleged breaches of contract and "poor" performance of its work. Respondents omit from the quotation of the statement of their counsel the words at the commencement thereof as follows (R. III, 116 (c)):

"Samford counterclaimed that"

The omission from the quotation in record submitted to this Court as a correct quotation from the record could not have been other than deliberate to give the impression that the evidence established breach of contract by petitioner, whereas counsel was merely stating what the counterclaim was. Such misstatement, without reference to evidence to support the same also occurs on pages 11 and 12 of respondents' brief. The arbitration award contains no such findings (A. 34).

3.

On pages 54 and 55 of respondents' brief it is stated that petitioner waived and ratified the qualifications and competency of Capacete by its "active participation and deliberate submission" to him and the other arbitrators for decision of the dispute regarding the effect, if any, on the arbitration award of the order in the New York bankruptcy proceedings of Samford staying litigation. Reference in support of such statement is made to R. V. 138 (35). The true situation is disclosed in the record in the statement of

petitioner's counsel to the District Court as follows (R. V. 138 (35)):

> "Mr. Romero: I want to clarify the point. The way they have been pleading in these cases, Your Honor will remember when we tried to continue the case against the bonding companies, Mr. Ramirez (respondent's counsel) said this court can't do anything, there is a stay order in a bankruptcy proceeding. *That's when your Honor ordered that we go to see if we could try it with the arbitration or obtain authority from the bankruptcy court. We did go to arbitration, we did show them what the Court wants, we never got anything from the arbitrators, that's when we came back*". (Italics ours.)

4.

Throughout their brief, respondents contend that petitioner never made any inquiry with respect to business relations, "directly or indirectly" between Capacete and respondents, and that the "record" clearly shows this "definitely and without question" and that there is no evidence in the record of such inquiry (Respondents' Brief, pp. 28-29, 43, 47).

Respondents inconsistently with its own statements and contentions nevertheless devote four and a half pages of their brief (pp. 51-55) to an attempt to discredit the affidavit in the record of Mr. Romero's (petitioner's counsel) affidavit which is directly to the contrary and which states that at the time of the designation of the arbitrators and prior to the arbitration hearings he *did* investigate the arbitrators to discover if any of them had, in the present

or past, any business or financial relationship, with respondent Samford or any of its affiliates or holding companies or with Samford himself, that he found none, and that none of the arbitrators ever informed him of such relations (A. 54).

Respondents in their brief argue as though there was an absence of inquiry (Resp. Br. p. 35), thus again completely ignoring the affidavit of Mr. Romero in the record that inquiry was in fact made.

In this connection, respondents admit in their brief (p. 98) that petitioner's counsel personally talked to Capacete about possible qualified arbitrators (A. 145) yet it is not denied that even at this time, when the arbitrator previously designated by petitioner had died and a new arbitrator was being considered, Capacete did not even then see fit to disclose to his "good friend" (A. 146) his previous relations with Samford.

5.

Respondents also assert in a footnote in their brief that petitioner for the first time in this litigation argued in its reply brief in this Court that it made inquiry "of respondents and/or Mr. Capacete" (Resp. Br. p. 28). This statement also is a total misstatement of the record. The Romero affidavit in the District Court was made on February 6, 1964 (A. 54), in support of the petition to vacate the award (A. 60). Respondents in their answer to the petition referred to Mr. Romero's affidavit and denied that it "proves anything with respect to Mr. Capacete" (A. 65). They did not deny that the investigation was made (A. 65). On the hearing in the District Court, respondent's counsel repeated the denial in the same language and stated that "defendant

is without sufficient knowledge or information to form a belief as to the truth of the allegations concerning what statements were made by Mr. Capacete to plaintiff's attorney", thus admitting that petitioner's counsel did make inquiry of Capacete (A. 78).

The affidavit of Mr. Romero was, of course, included in the record in the Court of Appeals (Appellant's Appendix, p. 54a). In its brief in the Court of Appeals petitioner referred to the affidavit in support of its appeal based on the failure of Capacete to make disclosure to Mr. Romero at the time of latter's inquiry (Petitioner's Brief in Court of Appeals, p. 6).

In its petition to this Court for a writ of certiorari (p. 7), petitioner again referred to Mr. Romero's affidavit, and again in its reply brief in support of the petition (p. 2).

Finally, the contention now made by respondents (Resp. Br. 28) that the point as to the investigation of the arbitrators was first made by petitioner in the reply brief to this Court was the ground for the respondents' petition for rehearing of the order granting certiorari by this Court on April 22, 1968, which petition was denied.

6.

Although Capacete testified that he personally performed services for respondent Samford, using the pronoun "I" (A. 136) in his testimony, respondents, throughout their brief (pp. 21, 22, 26, 27, 33, 36), refer to transactions between Samford and Capacete's company, Foundation Engineering Company, and not to Capacete's personal participation in such services. Respondents even state that all of the services were rendered by the Company, and not "in his own personal capacity" (Resp. Br. pp. 21, 26).

Such distortions of the record are apparently made in a vain effort to show that there was no concealment, because the transactions were between Capacete's company and Samford and not by Capacete personally. The extent to which respondents distort and misquote the record is shown by the reference in its brief to the question asked of Mr. Romero upon the hearing in the District Court as to whether he would have objected had he been told about *Capacete's* relationship with Samford (A. 151). Respondents refer to the question as having been asked as to the relationship between Samford and Foundation Engineering Company (Resp. Br. p. 40).

And in quoting the answer of Mr. Romero, to such question, in their brief (p. 40), respondents deliberately omit the following italicized portion of the answer (A. 151).

> "I don't think I would have objected because I know Mr. Capacete, *but I would certainly have told my client and given them the opportunity to determine.*" (Italics ours.)

Respondents in their brief (p. 40), also omit the next question and answer (A. 151).

> "So as a result you never told them? A. No."

7.

Respondents in their brief completely ignore the testimony of Capacete that *he* rendered the services, and that *he* owned the Foundation Engineering Company, which he supervised "naturally" *and that Samford was aware of that fact* (A. 136). Indeed, Capacete even "imagined" that Mr. Currie, respondents' counsel, was also aware of that fact (A. 136).

In any event, even if Capacete's services for Samford were rendered as a representative of his company, this of course was no justification for Capacete's and Samford's failure to disclose the relationship. The contention by respondent on this point is utterly without merit.

8.

Respondents also assert in their brief that "the grand total of all fees paid by all Samford's companies to Mr. Capacete's firm during this six year period was "only . . . in the order of $12,000.00" (Resp. Brief p. 24). Are we to understand from such contention that the duty and obligation of an arbitrator to disclose prior business and financial relationships depend on the amount he has received? Are we to understand from such contention, that the respondents wish this Court to determine the specific amount, in excess of $12,000.00, or the percentage of the arbitrator's gross income which would give rise to the duty and obligation to disclose the information which would disqualify him? Or that the payment to Capacete or his firm of only $12,000 was not sufficient in amount to establish partiality and to justify concealment?

9.

Respondents also make the contention that Capacete's services were in drilling for foundation investigation and testing related to site preparations, whereas petitioner's claims involved painting work on the very same projects (Resp. Br. p. 26).

Apparently, it is respondent's contention that the duty and obligation to make disclosure depend on the nature of the work performed by the arbitrator as distinguished from

the work performed by petitioner and that the duty and obligation arise only when the work of the arbitrator and the petitioner are the same in kind. The very statement of the contentions emphasizes its absurdity.

10.

We submit that the contentions of the respondents that the award herein should be sustained because a) the services of Capacete were rendered for the benefit of his company and b) that his company received only $12,000.00 and c) that the services were different from the work performed by petitioner, are so completely without merit as to be frivolous.

The Appointment of the Arbitrators

Respondents state in their brief (p. 131) that the official record of the arbitration proceedings reveals that it was not until after the Federal Court stayed petitioner's lawsuits against respondent Samford's sureties that petitioner designated an arbitrator who was willing to serve (Resp. Br. p. 131). No reference to the record is given to support such statement. The record is to the contrary.

The exhibits annexed to the sureties' motion for a stay of the suits, give the true statement with reference to the appointment of the arbitrators (R. I. 10, Exhibits 1-18).

On June 13, 1962, petitioner wrote to Samford advising that it was stopping work because of the failure of Samford to make payments (Exs. 1-5).

On July 5, 1962, Samford wrote to petitioner demanding arbitration on the five subcontracts (Exs. 1-5).

On July 27, 1968, Samford wrote to petitioner again demanding arbitration and designated Dwight Chapman as an arbitrator (Ex. 6).

On August 1, 1962 petitioner wrote to Samford agreeing to arbitration and designating Pedro Pons as an arbitrator. (Ex. 7).

On August 6, 1962, Samford agreed to one arbitration on the five contracts, on condition that the third arbitrator be named by the other two arbitrators and not by the architect (as provided by the arbitration clause in the contract) (Ex. 9, A. 46-47).

Between August 17, 1962 and December 15, 1962 correspondence between Samford and petitioner followed with reference to negotiations between the parties, culminating in a rejection by Samford of an offer by petitioner's attorney to settle for the sum of $95,000 (Exs. 11-16).

On November 26, 1962, petitioner filed suit against Samford's sureties (A. 2, 12).

On January 3, 1963, Mr. Chapman, the arbitrator designated by Samford, wrote to Samford that Mr. Pons the arbitrator designated by petitioner would not serve (Ex. 17).

On January 18, 1963, Mr. Currie, counsel for respondents, wrote petitioner that he represented Samford, that Mr. Pons refused to serve and to advise suggestions for filling the vacancy (Ex. 18).

Thereafter, petitioner selected an attorney named Aaron Holman as its arbitrator (A. 145). Respondents state in their brief (p. 9) that Holman was named after the sureties obtained the order staying the suits against them, but

there is nothing in the record to substantiate such statement.

Chapman and Holman designated Capacete as the third arbitrator (A. 145). Two or three days after the first meeting of the Board, Holman died (Capacete testimony, p. 145). Respondents make another misstatement in their brief (p. 9) to the effect that Holman died before the hearing could commence.

On June 17, 1963 Capacete wrote to Samford and petitioner reporting the death of Holman (Resp. Br. p. 56).

Thereupon, on June 25, 1963, during the very time that respondents were concealing Samford's previous relations with Capacete, Mr. Currie, counsel for Samford, wrote to the surviving arbitrators Capacete and Chapman, with a copy to petitioner's counsel (Resp. Br. p. 58) that to prevent the loss of the efforts and understanding of the two arbitrators appointed by the opposing parties in agreeing upon and selecting Mr. Capacete as the third arbitrator, Samford stipulated that *if* Chapman and *Capacete would continue* to serve,* then Commonwealth may immediately appoint a third arbitrator to fill the vacancy caused by the death of Mr. Holman, *without Samford's consent, but subject only to the right to object if the person selected is disqualified because of interests or involvements in the matters being arbitrated* (Resp. Br. p. 57).

It is this letter which petitioner's counsel referred to in the District Court as "evidence of a guilty conscience" and

* Capacete admitted that at one time he was going to resign from the Board of Arbitration and wrote a letter to the parties to that effect, and that he mentioned it to Mr. Currie, who requested him to stay as chairman of the Board as he said "all right, I will, and I stayed" (A. 135).

that Samford was making sure "the same situation" did not exist on petitioner's side (A. 88, 89).

Mr. Currie's response to the above statement of petitioner's counsel was that the reservation of the right to object was "a very reasonable thing and quite understandable" (A. 92). Apparently, it was "reasonable and understandable" for Samford to object to an arbitrator because of "interests" and "involvements" but not so for petitioner.

The Business Relations Between Capacete and Samford

Respondents contend throughout their brief that the business relations between Capacete and Samford were "remote", "isolated", "casual", "unrelated", "superficial", "insignificant", "occasional" and "very limited" (Resp. Br. pp. 1, 37, 47, 66, 76, 81, 107, 113, 134).

The Court of Appeals said (A. 193-194):

> "We may agree with appellant that where there is a *disturbingly close relationship* the very failure to make disclosure could be evidence of partiality, and we think it *would have been far better if there had been disclosure here.* However, we cannot say that this relationship was sufficiently close to establish evident partiality within the statute as a matter of law." (Italics ours.)

The Court of Appeals did not hold that the relations were "remote", "isolated", "insignificant", etc., as contended by respondent. On the contrary it held, in effect, that they were of such a nature that it would have been "far better"

if they had been disclosed. How much closer could the rendition of services by Capacete for Samford and payment therefor by Samford on the very projects involved in the arbitration be? Could there be a more "disturbingly close" relationship or a more sufficiently close relationship to establish evident partiality as a matter of law?

The entire tenor of respondents' brief is that notwithstanding the failure to make disclosure, the record does not show partiality in the arbitration hearings and that therefore the decision of the Court of Appeals should be affirmed.

Respondents concede in their brief that the arbitration involved a "magnitude and intensity of the heated and active dispute between the parties, two corporations, including many contested and contradicted contentions" (Resp. Br. p. 61). Who can say the rulings upon these questions were not affected by Capacete's secret and undisclosed business relationship with Samford?

It is significant that the arbitrator Munoz, who was chosen by petitioners from a list of attorneys given by Capacete to petitioner's counsel, as having had something to do with engineering cases (A. 145), testified as follows (A. 162):

> "I was dependent more on the technical questions on the cost items. I was depending more on Mr. Capacete as the expert and *the third member.*" (Italics ours.)

The reliance of Munoz upon Capacete *as the third member* of the board of arbitrators, indicates the importance of the position of the third or neutral member of a tripartite board of arbitrators.

Respondent's in their brief omit completely any discussion of the responsibility of the neutral arbitrator as distinguished from the arbitrators designated by the parties themselves. Respondents thus ignore the principle of law that in a tri-partite arbitration, the third or "neutral" arbitrator is held to a stricter standard of impartiality than the other arbitrators. Such stricter standard obviously includes a requirement that at least such "neutral" arbitrator must disclose that he is not in truth a "neutral" arbitrator.

Respondents attempt to avoid the facts as to concealment with phrases such as "no duty to volunteer information" (pp. 35, 38) information "not volunteered" (p. 45), "the duty is . . . not one of volunteering any and all information" (p. 46) "concealment . . . an allegation implying much more than merely not volunteering information" (p. 50) "volunteering of information as to relations likely to disqualify" (pp. 86, 87) "volunteer unsolicited information" (p. 87).

Respondents in their brief quote dictionary definitions of "evident", "partiality" and "partial" (Resp. Br. p. 62).

Respondents carefully omit any definition of "conceal" or "concealment" as those terms appear in Webster's Encyclopedia Dictionary, as follows:

"Conceal: . . . to hide . . . to cover . . . *to keep close or secret; to forbear to disclose; to withhold from utterance or declaration*"

"Concealment: The act of concealing, hiding or keeping secret."

The astounding contention of respondents, throughout its brief, that they were not required to volunteer information which would disqualify Capacete as an arbitrator (Resp. Br. p. 63), if upheld, would open the door to such corruption and fraud in arbitration and all judicial and extra judicial proceedings that it would undermine the administration of justice either through arbitration or litigation.

Even the Court of Appeals in its decision herein, in referring "to what should, in good faith, be volunteered and what may be left for inquiry", held that it would have been far better if there had been disclosure here.

It is stated by respondents in their brief (p. 16) that "*Samford has always stated, when asked,* that Foundation Engineers Company, Capacete's Company, had performed services for Samford (Resp. Br. p. 16). This is another gross misstatement of the record. No representative of Samford ever took the stand to give any testimony whatever with respect to its relations with Capacete.

The Alleged Admissions as to Capacete's Integrity

Respondents in their brief quote alleged "admissions" by petitioner's counsel as to the integrity of Capacete (Resp. Br. pp. 38-40). In not a single instance did petitioner's counsel admit that the arbitration proceedings or the award were not affected by the prior relations between Capacete and Samford.

On the contrary, petitioner's counsel stated to the District Court that the undisclosed relations were the ground for setting aside this award (A. 75, 88), and petitioner's counsel testified in support of the motion to vacate the award on the ground of the concealment and stated in his testimony that Mr. Currie, counsel for respondents, never at any time during any of the examinations or before the arbitration, tell him anything about Capacete's prior relationship with the Samford Company (A. 151).

The first petition to vacate the award was expressly made on the ground of evident partiality based on the failure to make disclosure and that Capacete "was not entirely disassociated, objective, wholly pure and impartial", that the award was wholly as a result of the evident partiality of at least one of the arbitrators (A. 37, 48). The second petition to vacate the award was made on the ground of fraud by Samford and Capacete in failing to make disclosure (A. 55-56, 60).

Notwithstanding the contentions made in the petitioner's entire brief to this Court based wholly on the ground that the award was invalid because of the failure of Capacete and Samford to disclose their prior relationship (Peti-

tioner's Br. pp. 3, 6, 7-15) and that such failure constituted evident partiality, corruption and fraud and misbehavior under the Statute (Petitioner's Br. pp. 16, 17-23), amazing statements are made in respondents' brief, that petitioner admits there was no actual partiality or bias on the part of Capacete (p. 34), that petitioner admits that Capacete was not actually partial or biased, in any respect (p. 38) and that petitioner is not arguing that the decision of the arbitration has in any way been affected by the previous business relationship between Samford and Foundation Engineering Company and that petitioner has made no allegation that the relationship had any actual effect on Mr. Capacete or the outcome of the arbitration proceedings, and that petitioner does not argue that the arbitration proceedings were unfair in any way or attempt to cast any suspicion on Capacete (Resp. Br. pp. 76, 87).

The *Ilios* Decision

Both the District Court and the Court of Appeals cited *Ilios Shipping and Trading Corp.* v. *American Anthracite & Bituminous Coal Corp.*, D. C. N. Y. 1957, 148 F. Supp. 698, aff'd 2 Cir., 245 F. 2d 873, in their decisions (A. 185, 193). That case is readily distinguishable from the case at bar. In *Ilios* the party seeking to vacate the award had knowledge before the arbitration of the business relations between the arbitrator and the opposing party.

The Court there said (p. 700):

> "However, even more important is the fact disclosed in the moving papers that the respondent knew before the arbitration that Mr. Ellison was in the insurance business and associated with John F. Curry Agency,

Inc., and that respondent could have inquired concerning the business relationship of his firm to any party interested in the arbitration. *Where a party has knowledge of the facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection.*" (Italics ours.)

It is undisputed that petitioner in the instant case had no knowledge of the relations between Capacete and Samford. Capacete admitted the failure to disclose the same (A. 27). No representative of Samford took the stand to deny the concealment. Neither Samford nor their attorneys ever advised Capacete that the matter should be disclosed (A. 136). Capacete even stated that he had no reason to believe that the matter should be disclosed (A. 137).

Respondents Are Responsible for the Invalidity of the Award

Respondents state in their brief that an annulment of the instant award would "frustrate the major purpose of arbitration, namely to provide a quick, final and inexpensive form of relief" (Resp. Br. p. 92). Respondents refer to the "thousands of hours of work required to arbitrate and resolve the complex disputes" (p. 92).

But respondents themselves, in secret co-operation with Capacete, the supposedly "neutral" chairman of the Board, by their concealment of the information which has vitiated this arbitration, are responsible for the present invalidity of the award. They have subjected petitioner to the tremendous burden and expense of carrying through this arbi-

tration when wholly unaware of the previous relation between Capacete and Samford on the very same projects involved in the arbitration. And to add insult to injury, respondents in their brief, even complain that petitioner has not paid their half of Capacete's $3,000.00 fee! (Resp. Br. p. 132)

Respondents, in their brief attempt to criticize the petitioner's performance of the subcontracts and its conduct during the arbitration proceedings, with ridiculous allegations such as "fleeing from cross-examination", failure to keep an eight o'clock appointment, etc. (Resp. Br. pp. 116-139).

The only issue before the Court of Appeals noted in its decision as "the sole ground of the appeal" was the failure of Capacete and Samford to disclose their past relationship (A. 193). Respondent did not urge in the Court of Appeals any alleged misconduct on the part of the petitioner in the arbitration proceedings or argue any point other than the failure to make disclosure (Resp. Br. in Court of Appeals).

Certiorari was sought in this Court and granted on the question as to whether the failure of Capacete and Samford to disclosure their prior relations was sufficient ground to vacate the award and constituted corruption and fraud in the procurement of the award, and misbehavior on the part of Capacete, within the provisions of the Federal Arbitration Act (Petition for Certiorari, p. 2). There was no discussion either in the petition for certiorari or the brief in opposition thereto as to any misconduct of petitioner or "abuses of the arbitration process" (Resp. Br. p. 116).

Respondents quote the proverb in their brief that "the guilty flee when no man pursueth" (Resp. Br. 25). We

submit that the attribute of "guilt" which respondents apply to petitioner, in truth and fact applies to respondents.

In any event, the conduct of petitioner during the arbitration proceeding is not a question submitted to this Court for review. If this Court should decide that the arbitration award herein is invalid within the provisions of the Federal Arbitration Act, the merits of the claims and counterclaims of petitioner and respondent will be presented and determined later in the proper forum.

CONCLUSION

The arbitration award herein should be set aside and the relief prayed for in petitioner's main brief (p. 31) should be granted, with costs of all proceedings.

Respectfully submitted,

EMANUEL HARRIS
Attorney for Petitioner
30 Vesey Street
New York, New York 10007
Telephone (212) 267-5700

EMANUEL HARRIS
MAX E. GREENBERG
SAYWARD MAZUR
On the Brief

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IN THE

Supreme Court of the United States

October Term, 1968

No. 14

COMMONWEALTH COATINGS CORPORATION,
Petitioner,

-v-

CONTINENTAL CASUALTY COMPANY,
FIREMAN'S FUND INSURANCE COMPANY
AND A. C. SAMFORD OVERSEAS, INC.,
Respondents.

REPLY AND SUPPLEMENTAL BRIEF OF RESPONDENTS

LUTHER P. HOUSE, JR.
Attorney for Respondents
1405 Fulton National Bank Building
Atlanta, Georgia 30303
Telephone 404-521-3800

FEDERICO RAMIREZ ROS
208 First Federal Building
Stop 23, Ponce de Leon Avenue
Santurce, San Juan, Puerto Rico

OVERTON A. CURRIE
EDWARD H. WASSON, JR.
1405 Fulton National Bank Building
Atlanta, Georgia 30303

On the Brief

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Telephone 404-521-3800

FEDERICO RAMIREZ ROS
208 First Federal Building
Stop 23, Ponce de Leon Avenue
Santurce, San Juan, Puerto Rico

OVERTON A. CURRIE
EDWARD H. WASSON, JR.
1405 Fulton National Bank Building
Atlanta, Georgia 30303

On the Brief

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REPLY AND SUPPLEMENTAL BRIEF OF RESPONDENTS

The Reply Brief of Petitioner, received by Respondents yesterday, contains such new, inconsistent, and erroneous contentions that Respondents respectfully provide this Reply and Supplemental Brief.

ARGUMENT

To make absolutely certain that no misunderstanding of Respondents' position has been created by the seemingly interminable variations in Petitioner's challenges of the arbitration award and the sheer bulk of the record now before this Court, the following statement is made:

> Not only as a matter of record in this case, but also to the best knowledge of counsel for Respondents as an officer of this Court, let it be said that neither Mr. Capacete, nor Respondents nor their counsel was ever *asked* by Petitioner or anyone representing Petitioner prior to the rendering of the arbitration award whether Mr. Capacete had ever had business relations with any of Respondents, and let it further be said that neither Mr. Capacete nor Respondents nor their counsel in any way *misled* Petitioner, or *concealed* anything from Petitioner, let alone participated together in a "secret cooperation" to "*conceal*" information about business relations as is now for the first time alleged by Petitioner. Reply Br., p. 17.

A. THE ESCALATION OF ALLEGATIONS

It is an onerous burden at each stage of this proceeding to attempt to restrain Petitioner from grossly departing from the facts of this case and to continue to find it necessary to reply to new allegations by Petitioner as each new pleading is filed.

The degree of wrongdoing alleged by Petitioner has reached a new high. Respondents are now, for the first time, faced with the allegation that they and the Chairman of the Board of Arbitration, Mr. Capacete, participated "in a secret cooperation" to "conceal" certain "information," no doubt the "information" that prior to the arbitration proceedings certain business transactions had occurred between Foundation Engineering Company of Puerto Rico and A. C. Samford Overseas, Inc. Reply Br., p. 17.

In the ever-increasing efforts of Petitioner to imply wrongdoing on the part of Mr. Capacete, Respondents and their counsel, Petitioner has departed more and more from the facts and the record.

At the trial of the case in the District Court, as more amply discussed in Respondents' main brief (Br. of Resp., p. 38-40), there was no such extreme charge of misconduct; Petitioner unequivocally admitted the "honesty and integrity" of Mr. Capacete, and stated categorically that no "allegation of fraud" was being made "against the arbitrators" or even that the Chairman had "acted improperly in any way." R. IV, 137(2); A. 75, 80-81, 88. To the Court of Appeals, in its Reply Brief, (p. 1-6) Petitioner suddenly and for the first time reversed its position about Mr. Capacete and challenged his integrity.

In the District Court, no allegation was ever made by Petitioner that, prior to the arbitration award, Petitioner or its counsel had ever *asked* Mr. Capacete or Respondents or Respondents' counsel questions concerning previous business relationships. A. 36-61, 74-183. Suddenly and for the first time, this allegation was

made by Petitioner in its Reply Brief to the Brief of Respondents in Opposition to the Petition for Certiorari (p. 1-2).

Now Petitioner charges "secret cooperation" between Mr. Capacete and Respondent Samford to suppress information. Reply Br., p. 17.

B. "SECRET COOPERATION WITH CAPACETE"

Petitioner alleges specifically,

> "But respondents themselves, in *secret co-operation with Capacete*, the supposedly 'neutral' chairman of the Board, by their concealment of the information which has vitiated this arbitration, are responsible for the present invalidity of the award." Reply Br., p. 17. (Emphasis added).

Nothing in the record supports such a serious and scandalous charge of conspiracy between this arbitrator and Respondents. To the contrary, Petitioners repeatedly stipulated in open court that Mr. Capacete had not done "anything fraudulent" or "acted improperly in any way" Br. of Resp., p. 38-40. To the contrary, Petitioner advised the court,

> ". . . we are in no way attacking the arbitrator's integrity. We believe him to be an honorable man." A. 88.

Respondent's Brief at p. 38 through 41 contains the quotations and record references to these and other such judicial certifications of Petitioner regarding Mr. Capacete which produced this judgment of the trial court:

> ". . . *counsel for plaintiff disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved.* He seeks to overthrow the award on the ground that Samford shouldshave

> informed plaintiff that the engineering firm with which the arbitrator involved was connected had in the past done work for Samford. In view of the fact that, not only has plaintiff failed to offer any evidence showing 'evident partiality' in said arbitrator (9 U.S.C. §10(b)), *it also expressly disclaimed any such imputation*, this objection to the award must be, and is hereby overruled. [Authority cited]." A. 185. (Emphasis added.)

The Federal District Trial Court, after hearing all the other evidence, further found and adjudicated:

> "In closing, I wish to state that the record shows that *the arbitrators conducted fair, impartial hearings;* that they reached a *proper determination of the issues before them*, and that plaintiff's objections represent a 'situation where the losing party to an arbitration is now clutching at straws in an attempt to avoid the results of the arbitration to which it became a party.' [Authority cited]." A. 185-186. (Emphasis added.)

The Court of Appeals held that ". . . the [District] Court was well warranted in finding that there was no prejudice or bias in fact manifested in the course of the proceedings. Indeed, there was considerable evidence which negatived it." 382 F.2d 1010, 1012; A. 194.

On the basis of the record and these lower court findings it is apparent there was no clear partiality, bias or "evident partiality" as found within the Arbitration Act.

Petitioner's belated effort in this regard is really just an attempt to equate non-disclosure with "concealment," but as a matter of common English these are not equivalent expressions. *Corpus Juris Secundum* states,

> "The act of concealment has to do with what concerns others, and implies an act done or procured to be done, which is *intended to prevent or hinder; something more than a mere failure to disclose.* It also implies a *conscious act*, an *active intention to secrete*, a *design*, or *purpose*, *something more than mere silence*, an intention of some sort, and secrecy." 15A C.J.S., *Concealment*, p. 317-318. (Emphasis added.)

Respondents had a right to assume that Petitioner and Petitioner's Puerto Rican and New York attorneys possessed sufficient information to be satisfied with and accept Mr. Capacete as an arbitrator, waiving any right to complain about information it did not have which was readily available. Respondents' many representatives had no idea what Petitioner knew or did not know. From this environment, inaction by Respondent was a natural exercise of a fundamental right found within the adversarial system. To construe this non-disclosure as "concealment" is wholly illegitimate as a matter of definition, as well as by reason in view of the total absence of probative evidence.

C. LACK OF INQUIRY

Petitioner's Reply Brief (p. 4) repeats its earlier unsupported and incorrect allegation,[1] raised for the first time at the Supreme Court level, (see Respondents' Brief, p. 28-32) that Petitioner inquired of Mr. Capacete or Respondents or their counsel about Mr. Capacete's qualifications or relationships. Petitioner relies solely on the affidavit of Mr. Romero. The argument that this affidavit is proof of actual inquiry has been completely rebutted by Respondents' Brief (see pages 51-56).

[1] Reply Br. of Pet. to Br. of Resp. in Opposition to Pet. for Cert., p. 1-2.

Further comment on this spurious argument is unwarranted.

Petitioner has now even gone further and in its new reply (p. 5) contend that Respondents' pleadings and contentions resulted in "' . . . admitting that petitioner's counsel did make inquiry of Capacete." A. 78. Respondents and their attorneys never, expressly, impliedly, or otherwise, made such admission, but always clearly contended the opposite, as the record plainly reveals. A. 65, 78-79. Respondents' brief, especially from pages 42 through 62, reviews the history of the pleadings of all parties in the litigation. This establishes that not only have the Respondents never made such an admission, but that the Petitioners never made such an unsupported and incorrect contention until filing its Reply Brief. A review of the record and Respondents' brief clearly establishes that this is not only a new position, but is inconsistent with the pleadings, allegations, briefs, and implied admissions of the Petitioner itself. More specifically, Respondents' brief and the record at the places therein cited establish that Petitioner never alleged that it made inquiry of Respondents or any of Respondents' attorneys or representatives or Mr. Capacete, but rather maintained only that Respondents had the duty to disclose information regarding Mr. Capacete's qualifications and past relationships. Br. of Resp., p. 44-49. If inquiry had been made, as now alleged by Petitioner, why did earlier pleadings seek to establish a duty to disclose absent inquiry?

It should be further noted that all discussion about inquiry would be rendered moot if in fact Petitioner were aware of the disputed business relationship be-

tween Mr. Capacete and Respondent Samford. Despite Petitioner's purported lack of knowledge here, a strong case for "constructive knowledge" of that relationship has been made in Respondents' Brief (p. 97-99). The following definition is illustrative of the law governing "constructive knowledge":

> "'Constructive knowledge' is defined to be knowledge or notice of circumstances which would put a prudent man upon inquiry as to the fact in question; . . . knowledge which might have been acquired by diligence, but was not acquired." 16A C.J.S., *Constructive*, p. 1239.

In this connection the Georgia Code codifies this legal and equitable principle in the following clear language:

> "Notice extends to facts discoverable.—Notice sufficient to excite attention and put a party on inquiry shall be notice of everything to which it is afterwards found such inquiry might have led. Ignorance of a fact, due to negligence, shall be equivalent to knowledge, in fixing the rights of parties." 12A Ga. Code Ann. §37-116.

> "Negligence and concealment.—If a party, by reasonable diligence, could have had knowledge of the truth, equity shall not relieve; nor shall the ignorance of a fact, known to the opposite party, justify an interference, if there has been no misplaced confidence, nor misrepresentation, nor other fraudulent act." 12A Ga. Code Ann. §37-211.

Considering the small size of Puerto Rico, the magnitude of the work of Petitioner and Respondent Samford, the sophistication of Petitioner's construction management and the close social relationship between Petitioner's counsel and Mr. Capacete, it is very difficult to believe there was not in fact actual knowledge of

previous business relationships. If there was not actual knowledge, in any event there was constructive knowledge for the foregoing reasons and others stated in Respondents' Brief. See Br. of Resp., p. 44-49.

D. "MISREPRESENTATIONS" BY WHOM?

Petitioner in its effort to create suspicion about the validity of the arbitration award has vacillated between Mr. Capacete and Respondent Samford and even counsel for Respondent Samford as to whom is alleged to have been asked about business relations by Mr. Romero, which inconsistencies of position by Petitioner obviously indicate that Petitioner is casting about in a vain effort to create the impression of wrongdoing.

On page 1 of its Reply Brief, Petitioner says, in quoting from the statement of its counsel to the District Court, that the allegation of fraud is not against the arbitrators, but is against the Samford Company. On page 5 of the Reply Brief, however, Petitioner apparently alleges that Petitioner's counsel, Mr. Romero, made "inquiry of Capacete," implying that Mr. Capacete made misrepresentations to Petitioner's counsel since Petitioner's counsel has sworn by affidavit that no one informed him of the business relationships. A. 54. It should be well noted that the only testimony on this point was given by Mr. Capacete, who said that Mr. Romero made no such inquiry. A. 146.

In the Reply Brief of Petitioner to the Brief of Respondents in Opposition to the Petition of Certiorari, at one point Petitioner attacks both Respondents and Mr. Capacete by implying inquiry was made "of the

party or the arbitrator" (p. 1-2). Shortly thereafter, in that brief, Petitioner argues by implication that the affidavit of Mr. Romero states that inquiry was made of the Respondents or their counsel concerning previous business relations (p. 2).

It is manifest there is a significant omission and inconsistency in these allegations. Who supposedly made the alleged misrepresentations?. Is Petitioner saying that it asked *all* of these persons, Mr. Capacete, the Respondents and Respondents' counsel, and that they *all* made misrepresentations to Petitioner? Or, is Petitioner arguing that it asked *one* of these persons or parties and *that person or party* made the alleged misrepresentations? The latter proposition is inconsistent with the allegations, while the former is ridiculous as well as inconsistent with the allegations. It cannot be doubted, irrespective of the vague and obtuse phrasing of these allegations, that Petitioner is saying *someone* made misrepresentations about business relations, but for some reason Petitioner remains totally indefinite, contradictory and silent in saying exactly who.

The only conclusion which can be drawn from such vacillation and failure to be specific about an inquiry allegedly made by Petitioner's own counsel, coupled with the fact that it was not alleged in the District Court that Mr. Capacete, Respondents, or their counsel were even asked, is that this argument is no more than an afterthought interpretation of Mr. Romero's affidavit as a last, frenzied attempt to void the award, regardless of the means.

It bears repeating that the sole basis for the allegation that inquiry was made, not generally, but specifically of Mr. Capacete, Respondents, or their counsel,

is the affidavit of Mr. Romero,[2] which is not evidence, which has been denied insofar as it is purported to make such an allegation, which in fact makes no such allegation, and which is the statement of the counsel who himself made credibility an issue and whose statement as a witness as to objections made in the arbitration proceedings was thereafter disproved totally. See Br. of Resp., p. 51-56.

E. TEXT, CONTEXT, PRETEXT

It is fundamental that any text, taken out of context, becomes a pretext. Petitioner's Reply Brief alleges Respondents' Brief contains errors, omissions, and misstatements. Respondents' Brief faithfully, accurately and fairly quotes from the record which contains portions of the pleadings, counsel's statements, testimony, and other material. Only the relevant portions of the record were quoted dealing with the specific subject being discussed. It is respectfully submitted that a careful reading and comparison of Respondents' Brief and the record will demonstrate that Petitioner's Reply Brief has frivolously charged Respondent with distorting and misquoting the record.

F. IMPORTANT MISSTATEMENTS BY PETITIONER

Rather than making an effort to answer the merits of the arguments of Respondents, Petitioner attempts in its Reply Brief to impeach the brief of Respondents by saying that there are errors, omissions and misstatements in the brief. Many of the allegations made by

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[2] Reply Br., p. 3; Reply Br. of Pet. to Br. of Resp. in Opposition to Pet. for Cert., p. 1-2.

Petitioner do not merit response. However, several of Petitioner's allegations constitute such egregious misstatements of the facts and relate to issues of such importance to the case, that Respondent must additionally refute those not already discussed above.

1.

Petitioner argued that the evidence in the arbitration proceedings did not establish breach of contract by Petitioner and that the award contained no such findings. Reply Br. of Pet., p. 2.

To the contrary, the arbitrators found,

> "Commonwealth [Petitioner] without contractual right abandoned and failed to perform their work on the five subcontracts . . ." (A. 34),

and the arbitrators awarded Respondent Samford $15,872.35 in damages as a result.

2.

Petitioner claims that Respondents' argument (Br. of Pet., p. 14) that Petitioner ratified the authority and its acceptance of Mr. Capacete as an arbitrator by returning to the Board to seek relief is unsound because Petitioner claims that it was ordered to follow this procedure by the District Court. It should be noted that Petitioner made no objection to the qualifications of the Board to hear and rule on the challenges to the award, and it is significant that Petitioner did not in any manner present the issue of fraud to the Board.

3.

Petitioner devotes substantial space in its Reply Brief to questioning the relevancy of Respondents' dis-

cussion of the amount of remuneration received by Mr. Capacete from Respondent Samford and the fact that the services of Mr. Capacete's firm were related to matters unrelated to the painting work on the projects involved. Petitioner's impatience with these points can best be refuted by the simple fact that it is obviously relevant to determine whether business relationships were substantial or insubstantial and whether they were proximate or remote, past or present. Respondents have at length established the insubstantial size and remote nature of the engineering services performed by Foundation Engineering Company a year or more prior to the arbitration proceedings. And of course the Court of Appeals found the matter of degree of importance of the business relationship the key issue in confirming the award. See Respondents' Brief, pages 16-28.

4.

Petitioner alleges that another "gross misstatement of the record" by Respondents is that Samford has always stated, when asked, that Foundation Engineering Company had performed services for Samford. The derogatory implications are that Samford did not make its answer or was not truthful in its answer regarding the issue of business relations. The various pleadings filed by Petitioner to challenge the award alleged business relations between Mr. Capacete and Respondent Samford, and the business relations between these parties as described in the answer of Respondent Samford were admitted forthrightly. A. 65.

5.

Petitioner claims,

> "Respondent's [*sic*] in their brief omit completely any discussion of the responsibility of the neutral

arbitrator as distinguished from the arbitrator designated by the parties themselves." Reply Br., p. 13.

On pages 86 and 87 of their brief Respondents discuss this exact point in distinguishing the *Astoria Medical Group* case.[3] Respondents correctly report that the vast majority of decisions make no distinction as to standards of conduct between arbitrators chosen by the adversaries and neutral arbitrators; in fact, several of the cases relied upon by Respondents where the award was upheld involved charges of partiality of the *third* arbitrator. See especially *Cross Properties, Inc. v. Gimbel Brothers, Inc.*, 225 N.Y.S.2d 1014 (App. Div. 1962), aff'd 236 N.Y.S. 61 (Ct. App.), discussed on page 75 of Respondents' Brief.

6.

Petitioner has alleged in its Reply Brief (p. 10) that the letter of Mr. Currie to the two surviving arbitrators concerning selecting the replacement for Mr. Holman on his death is "evidence of a guilty conscience." As pointed out quite clearly in pages 56-62 of Respondents' Brief, the reservation of rights contained in the letter was inserted only to insure that the rights given to Respondents under the law (the same rights which Petitioner had) were preserved.

7.

Once again Petitioner has misstated the holding of the *Ilios Shipping* case,[4] in a futile effort to distinguish

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[3] *Astoria Medical Group v. Health Insurance Plan*, 11 N.Y.2d 128, 227 N.Y.S. 2d 401 (1962).

[4] *Ilios Shipping and Trading Corp. v. American Anthracite & Bituminous Coal Corp.*, 148 F.Supp. 698 (S.D.N.Y. 1957), aff'd 245, F.2d 873.

the decision.[5] Respondents have been compelled to correct each successive misstatement of the case holding.[6] Petitioner claims that the case holds that an award will not be vacated where,

> "the party seeking to vacate the award had knowledge before the arbitration *of the business relations between the arbitrator and the opposing party.*" (Emphasis added.) Reply Br. of Pet., p. 16.

However, the court states that the *only* facts of which the party seeking to vacate the award had knowledge were that the arbitrator in question was "in the insurance business and associated with John F. Curry Agency, Inc.," *not* that the party knew what *business relationships* his firm had with any party interested in the arbitration. The critical part of the holding in the *Ilios Shipping* case, instead, is that,

> "*Respondent could have inquired concerning the business relationships of his firm [the Curry Agency] to any party interested in the arbitration.*" (*Emphasis added.*)

Most revealingly, Petitioner does not address itself to the fact that in the case at bar, Petitioner with knowledge of the businesses of Mr. Capacete and Respondent Samford and their interrelated character, could likewise have easily inquired of Mr. Capacete, Respondents or their counsel, concerning business relationships. Failing to do so, and remaining silent, constitute a waiver of the objection on this ground.

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[5] See the same misstatement in Br. of Pet. to Court of Appeals, p. 17-18, Reply Br. of Pet. to Court of Appeals, p. 6, and Pet. for Cert., p. 15.

[6] See corrections of the misstatements in Br. of Pet. to Court of Appeals, p. 16-17 and Br. of Respondents in Opposition to Pet. for Cert., p. 18.

G. "UNDERMINING THE ADMINISTRATION OF JUSTICE"

Petitioner's Reply at page 14 states:

> "The astounding contention of respondents, throughout its brief, that they were not required to volunteer information which would disqualify Capacete as an arbitrator (Resp. Br. p. 63), if upheld, would open the door to such corruption and fraud in arbitration and all judicial and extra judicial proceedings that it would undermine the administration of justice either through arbitration or litigation."

This policy argument is impractical, unwise and invalid.

The jury system in both criminal and civil cases, does not require an adversary to volunteer information regarding the qualifications of jurors. It is universal and fundamental that failure to inquire of jurors on *voir dire* examination before they start serving constitutes waiver. Br. of Resp., p. 107-108. Also, it is universal and fundamental that no party is required to volunteer information regarding the qualifications of a judge. Further, no decisions have been found that require *a party* in arbitration to volunteer information to his adversary regarding the qualifications of the arbitrator. These laws and policies regarding juries, judges and arbitrators have prevailed for decades without undermining the administration of justice.

To change these human, reasonable and natural rules will, to use Petitioner's words, "open the door to . . . corruption and fraud" in that a litigant may deliberately avoid inquiry and avoid disclosing his knowledge of possibly disqualifying relationships so that if

he is unsuccessful in the arbitration or litigation, he may then claim the award is void for alleged disqualifying relationships which were easily discoverable or known before the trial or award. Also, the nature, degree and characteristics related to the qualifications or disqualifications of an arbitrator are so variable and relative—business, social, religious, fraternal, kinship by blood or marriage, etc.—often forgotten, remote or unknown, that there would be an unrealistic burden of guessing just what should be voluntarily revealed to an adversary who is not sufficiently interested or concerned to inquire.

Further, the above policy argument of Petitioner's Reply is without merit because the past relationship of Mr. Capacete was not disqualifying. Arbitrators have been described as quasi-judicial and compared to jurymen and judges. Mr. Capacete's past relationship would not have disqualified him to serve on a jury. Also, such a past relationship would not have disqualified him to serve as a judge of this same case, even under the high standards imposed on a Federal District Trial Judge.

Petitioner attempts to make arbitration more restrictive, legalistic and technical than the law relating to trials by jury or judges. Such would thoroughly defeat the philosophy and practical value of arbitration which is intended to be more informal and flexible. Commercial arbitration is dependent upon consenting contracting parties to select and agree upon their rules and decision-making arbitrators. Contracting parties should still be expected to exercise diligence and be free to waive disqualifications and inquire and accept arbitrators as they desire. Any precedent that would en-

courage the challenge or diminishment of the confidence in the efficiency and finality of arbitration awards would do the commercial world and society a severe disservice by curtailing an otherwise viable remedy now being used increasingly to meet the needs of a growing society of mounting complexity.

CONCLUSION

For all of the above reasons, the decision of the Court of Appeals should be affirmed, thereby confirming the award of the Board of Arbitration, with costs assessed against Petitioner.

This 18th day of October, 1968.

LUTHER P. HOUSE, JR.
Attorney for Respondents
1405 Fulton National Bank Building
Atlanta, Georgia 30303
Telephone 404-521-3800

FEDERICO RAMIREZ ROS
208 First Federal Building
Stop 23, Ponce de Leon Avenue
Santurce, San Juan, Puerto Rico

OVERTON A. CURRIE
EDWARD H. WASSON, JR.
1405 Fulton National Bank Building
Atlanta, Georgia 30303
On the Brief

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IN THE

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Petitioner,

-v-

CONTINENTAL CASUALTY COMPANY,
FIREMAN'S FUND INSURANCE COMPANY
AND A. C. SAMFORD OVERSEAS, INC.,
Respondents.

PETITION FOR REHEARING

OVERTON A. CURRIE
Attorney for Respondents
1405 Fulton National Bank Building
Atlanta, Georgia 30303
Telephone 404-521-3800

EDWARD H. WASSON, JR.
DAVID E. WALKER
1405 Fulton National Bank Building
Atlanta, Georgia 30303

FEDERICO RAMIREZ ROS
208 First Federal Building
Stop 23, Ponce de Leon Avenue
Santurce, San Juan, Puerto Rico

On the Brief

PERSPECTIVE

"A hen is only an egg's way of making another egg."

Samuel Butler
Life and Habit, Ch. 8

ETHICS AND THE DUTY TO INQUIRE

"Ask, and it shall be given: seek, and ye shall find: knock, and it shall be opened unto you: for everyone that asketh receiveth: and he that seeketh findeth and to him that knocketh it shall be opened."

Matthew 7: 7-8

RECONSIDERATION

"Only the hand that erases can write the true thing."

Meister Eckhart

"I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday."

Jackson J., *Massachusetts v. United States* (1948), 333 U.S. 611, 639, 92 L. Ed. 968, 986, 68 S. Ct. 747

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-v-

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OVERTON A. CURRIE
Attorney for Respondents
1405 Fulton National Bank Building
Atlanta, Georgia 30303
Telephone 404-521-3800

EDWARD H. WASSON, JR.
DAVID E. WALKER
1405 Fulton National Bank Building
Atlanta, Georgia 30303

FEDERICO RAMIREZ ROS
208 First Federal Building
Stop 23, Ponce de Leon Avenue
Santurce, San Juan, Puerto Rico

On the Brief

MOTION FOR REHEARING

Respondents pray that this Court grant rehearing of its decision of November 18, 1968, vacating the arbitration award, 21 L.Ed.2d 301 (1968), and that this case be remanded for further proceedings in the Federal District Court, or reversed, for the reasons stated herein:

SUMMARY OF REASONS FOR THE GRANTING OF A REHEARING AND REMAND OR REVERSAL OF THE CASE

(1) There is not a scintilla of evidence to support the fundamental basis of the Court's decision, namely, that ". . . the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to Petitioner. . . ." No proof was submitted by Petitioner at the trial that it did not know of the relationship, and that it relied on this assumption. In fact, the issue of partiality was never tried by the District Court, the Court having ruled there was no "evident partiality" by reason of the admissions of Petitioner. Since this Court has held, in effect, that the trial court erred in following that standard, Respondents are now entitled to a trial under the "appearances" test as adopted by this Court; to rule otherwise would deny Respondents' right to trial. On a new trial Respondents will prove that Petitioner had knowledge of the allegedly disqualifying relationship.

(2) This Court erred in failing to adequately consider the admission of Petitioner that Mr. Capacete was innocent of any actual partiality, bias or improper motive; this admission totally negates any possible appearance of wrongdoing. The Court noted only that Petitioner did not charge Mr. Capacete with fraud or bias, but

Petitioner actually did far more, it admitted there was no actual partiality, bias or improper motive *as a matter of fact*, and even agreed to resubmit the case to the same Board of Arbitrators. Such admission of the qualifications of Mr. Capacete entirely dispels any "appearance," "suspicion" or "impression" of possible wrongdoing. Surely the reality of the case shall control appearances.

(3) The decision of this Court holds an arbitrator to the same standards that govern disqualification of a judge or juror. It is earnestly submitted that were Mr. Capacete a judge or juror in the subject arbitration he would not have been disqualified, because his interest in the subject matter of the proceeding was not present, direct, pecuniary or proprietary, and substantial in view of all the facts and circumstances. The Court in applying these standards to the facts on the record committed fundamental factual error. Respondents, moreover, have been deprived of their right to trial on the question of whether Mr. Capacete would be disqualified were he serving as a judge or a juror in the dispute arbitrated.

(4) The decision of this Court is contrary to judicial precedent, the facts of this case and Congressional intent as to the duty of arbitrators to volunteer information and creates thereby a truly burdensome and unrealistic duty for the untold numbers of arbitrators commissioned to resolve disputes in private informal proceedings.

REMEDY REQUESTED

For all of the reasons summarized above and developed hereinafter, Respondents respectfully request that this motion for rehearing be granted.

Respondents earnestly submit that the case should be remanded for trial, because:

(1) There was no trial in the District Court on the issue of "evident partiality," the only issue tried being whether certain exhibits were properly admitted by the Board of Arbitrators, and Respondents will prove in a trial that Petitioner had knowledge of the allegedly disqualifying relationship; and

(2) Trial was not had in the District Court on the issue of whether Mr. Capacete would be disqualified as a judge or juror in the dispute, and Respondents will prove that Mr. Capacete would not have been disqualified as a judge or juror.

Respondents submit, in the alternative, that this Court's decision should be reversed, because:

(1) Petitioner failed to carry its burden of proof to show lack of knowledge of the previous business relationship of which it complains, and to show reliance of Petitioner on the assumption that there was no previous relationship;

(2) The Court erred in not adequately considering the admission of Petitioner that Mr. Capacete was innocent of any actual partiality, bias, or improper motive, which admission causes Mr. Capacete to qualify as an arbitrator under the "appearances" test adopted by this Court;

(3) The Court should find as a matter of law that, had Mr. Capacete been a judge or juror, the previous business relations would not have disqualified him from serving in the dispute under the standards applicable to judges or jurors; and

(4) As a matter of law, this decision is contrary to judicial precedent, the facts of this case and Congressional intent.

AFFIDAVITS SUBMITTED IN SUPPORT OF MOTION FOR REHEARING

In support of the foregoing Petition and Prayer, Respondents respectfully request the Court to consider the following justifications based upon the record, cited legal authorities and affidavit of Respondents' representatives, Mr. A. C. Samford, Jr. and Mr. Roger Dickinson, and the affidavit of Respondents' counsel. These affidavits, printed in the appendix hereto (see p.46, *infra*) with their originals being filed with the Clerk of this Court, respectfully give evidence that:

(1) The relationship and ownership of the Respondent corporation had totally changed before the arbitration; the Vice-President and Executive Officer who had engaged Mr. Capacete's firm had terminated employment with Respondent more than a year before the arbitration. These changes in ownership and officers were publicly announced and known actually or constructively to both Mr. Capacete and Petitioner. Respondent had commenced using the testing and consulting services of another engineering firm in competition with Mr. Capacete's firm. Mr. Capacete was not a close social or business associate of Respondent Samford or its officers, agents, or attorneys. The relationship when fully and completely understood explains the innocence and uncalculated nature of the nondisclosure by Mr. Capacete of a previous business relationship, which he had every reasonable right to assume the Petitioner knew of or waived objection to, since Mr.

Capacete's and Respondent's business dealing had been in public view on job sites where Petitioner's forces were present, during working hours, with no effort to hide or conceal their work or their past relationship.

(2) Petitioner and its attorneys never inquired of Respondents or their agents or representatives and attorneys about Mr. Capacete's or any of the other arbitrators' qualifications and past relationships although they were in frequent contact with various representatives of Respondent Samford and its attorneys in Puerto Rico. There was constant opportunity to make such inquiry, but Petitioner made no such inquiry in letters, in interrogatories, in pretrial hearings or in any other contacts prior to or during the arbitration proceedings; attorneys for Petitioner and Respondents were always present during conferences; and Respondents and their attorneys had every reasonable right to assume that Petitioner knew all that it desired to know regarding the qualifications of the arbitrators and therefore there was no calculated or conscious effort to prevent disclosure of past relationships, but Respondents and their representatives dealt in good faith with Petitioner, who was active as an adversary with no fiduciary relationship or any form of dependency upon Respondents existing.

(3) Petitioner had breached many promises, commenced litigation, engaged New York and San Juan attorneys, threatened the Respondents and attempted to intimidate Respondents by reporting that Petitioner had engaged the nation's most outstanding attorney in this legal field. Respondents' attorney did not know of previous relationships about which Petitioner complains or that Petitioner did not know of them. Respon-

dents' attorneys did know that Mr. Capacete had previously jointly served the Respondent and the Puerto Rican Health Authority in adjusting, deciding and recommending the settlement of a dispute between them on a laundry job, on which Petitioner was a subcontractor, and it was assumed and believed that representatives of Petitioner had knowledge of at least this past relation because of the wide notoriety of the construction dispute and contest between Respondent Samford and the Medical Authority's Chief Resident Engineer. The enormity of this dispute is revealed by the fact that the Chief Resident Engineer had been so difficult for prime and subcontractors to deal with Respondent Samford made the rare request of the Authority that he be replaced. Respondents' attorneys continually and widely discussed this matter with subcontractors and others. It is believed that it could be established that Petitioner and its representatives knew of this dispute and Mr. Capacete's employment by Respondent Samford there.

ARGUMENT

I. THERE IS NO EVIDENCE WHATSOEVER TO SUPPORT THE FUNDAMENTAL BASIS OF THE COURT'S DECISION, NAMELY, THAT ". . . THE FACTS CONCERNING THE CLOSE BUSINESS CONNECTIONS BETWEEN THE THIRD ARBITRATOR AND THE PRIME CONTRACTOR WERE UNKNOWN TO PETITIONER. . . ."

The Court predicates its opinion on the critical assumption of fact that Petitioner *did not know* that the engineering consulting firm with which the third arbitrator, Mr. Capacete, was associated had performed

certain services for Respondent, A. C. Samford Overseas, Inc. The Court's statement is:

> ". . . An arbitration was held *but the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to petitioner* and were never revealed to it by this arbitrator, or by the prime contractor, or by anyone else until after an award had been made." (Emphasis added.)

There is a total absence of any evidence in the case to support this essential premise to the Court's opinion that Petitioner did not know of the past business relations.

A. MR. ROMERO'S AFFIDAVIT IS NOT PROOF IN THIS ACTION AND IS NOT RELEVANT TO THE ISSUE OF KNOWLEDGE OR THE RELIANCE OF PETITIONER.

Petitioner has attempted to argue as "proof," and as its *only* "proof," concerning lack of knowledge of the relationship that the affidavit of its attorney, Mr. Carlos Romero Barcelo, (A.54) supports its allegation of fraud or partiality. A. 69; Reply Br. of Pet., p. 4. However, the allegations of partiality and fraud and any effect of Mr. Romero's affidavit on the award were categorically denied by Respondents in their answer which was sworn to (A. 65, 68-69, 73), and in all subsequent proceedings (*e.g.* A. 78-82).

Of conclusive importance is the fact the affidavit of Mr. Romero has never become proof or evidence in this action. The affidavit itself was never introduced into evidence (A. 86-183) and no testimony was taken concerning most of the statements contained in the affidavit although Mr. Romero himself testified at the trial (A. 148-154).

Secondly and of equal significance is the total absence in the affidavit of any statement that *Petitioner* did not know of this relationship and that Petitioner *relied* on this assumption. A. 54. Mr. Romero did perhaps imply in his affidavit that he *personally*, without mentioning Petitioner, did not know of the relationship, but Mr. Romero's affidavit does not state that *Petitioner* did not know of the relationship. Thus, the affidavit cannot be said to support the premise that Petitioner had no knowledge, and the affidavit is of no relevance whatsoever on this issue. See Br. of Resp., p. 51-56.

B. NO PROOF WAS SUBMITTED IN THE TRIAL OF THE CASE BY PETITIONER THAT PETITIONER DID NOT KNOW OF THE PAST RELATIONSHIP OR THAT PETITIONER RELIED ON THIS ASSUMPTION, AND THESE ISSUES WERE NEVER TRIED.

In the hearings in the District Court and the trial of the case by the District Court, not an iota of proof was submitted by Petitioner to show that Petitioner did not know of the past relationship between Mr. Capacete's firm and Respondent Samford or that Petitioner relied on this assumption. Petitioner had alleged that the award was void on five independent grounds:

(1) By reason of the rendition of the award allegedly in violation of a general restraining order issued in bankruptcy proceedings involving Respondent Samford;

(2) By reason of the alleged "evident partiality" of Mr. Capacete;

(3) Because arbitration hearings were held on Sundays and Labor Day;

(4) By reason of the award's having been entered more than thirty days following the close of the oral hearings; and

(5) Because certain exhibits of Respondent Samford were admitted into evidence by the Board allegedly over the objection of Petitioner and Petitioner was allegedly denied an adequate opportunity to examine these documents and cross-examine Respondent Samford's witnesses. A. 87-91.

All of these issues with the exception of the last, the issue of admission of certain exhibits, were resolved by the District Court *prior to* the actual taking of testimony in the case in pretrial proceedings. On numerous instances during the actual trial, the District Court continually reiterated that the *sole issue* being tried was the issue of admission of certain exhibits of Respondent Samford, allegedly after objection and without opportunity for cross-examination. See p. 13, *infra*. At the commencement of the trial when the Court limited the issue to be tried to that issue Petitioner made no objection to trial on that issue alone. A. 99.

Petitioner apparently believed that it was not necessary for it to furnish proof on the remaining issues. Respondents in their pleadings and in open court had denied the various allegations by Petitioner of fraud, "evident partiality," etc., made by Petitioner (A. 65, 68-69, 78-82); Respondents had admitted the occurrence of certain past business transactions as set forth in the answer of Respondents (A. 65), and alleged that Petitioner "knew or should have known of the previous professional services. . . ." A. 66. Apparently Petitioner initially believed that the mere existence of the past relationships was sufficient to establish its case, but it

thereafter disaffirmed any actual partiality, fraud, or wrongdoing. See p. 28, *infra*. As a result, Petitioner furnished no proof whatsoever that it did not know of the past relationship or that it relied on this assumption in agreeing to arbitrate the matter before the Arbitration Board which included Mr. Capacete.

The District Court itself did not feel compelled to hear evidence on the issue of partiality because of the number of admissions of Petitioner prior to the actual taking of testimony to the effect that Petitioner admitted Mr. Capacete was not actually partial. See p. 28, *infra*. Several times during the trial, the Court indicated that it had decided to rule against Petitioner on this issue (see p. 22, *infra*), and in the decision of the District Court it is confirmed that its ruling was based on the disclaimer by Petitioner of any fraud, partiality or bias on the part of Mr. Capacete. A. 185.

The proceedings in the District Court concerning the challenges of the award consisted of four separate hearings, the last being the actual trial of the case where the testimony of five witnesses was presented. In the first hearing on February 28, 1964, the Court heard argument of counsel, principally on the issue of the effect of the restraining order of the bankruptcy court. A. 22. On June 25, 1965, the second hearing was held by the District Court on several motions pending, principally the motion to set the case for trial. A. 23. The Court denied the motion but set a hearing on the question of vacation of the award. *Ibid.* The third hearing was held on July 16, 1965, and at this hearing counsel presented arguments on the various issues involved. R. V. At the close of the hearing on July 16, 1965, when counsel for Respondents, Mr. Currie,

attempted to respond to certain of the allegations made by Petitioner to the Court previously during the hearing, the Court stated, ". . . I don't have more time" [R.V, 138(41)] and strongly indicated its desire to close the hearing at that point. The Court added, to assure Respondents that they would have ample opportunity to submit evidence,

> "I know your views on these two points [concerning the issue of partiality and the effect of the restraining order], I am not going to decide any more than these two points until I believe I can render a decision on these two points, and I have to consider the other ones, then I will say so, and if I say that I can render a decision on these two points and *I need support on the evidence for that, I will also let you know.* I will set a hearing." *Id.* at (41-42). (Emphasis added.)

Counsel for Respondents then attempted to argue further against contentions of Petitioner on the partiality issue and tendered to the Court various evidence to support its position on the issue, but the Court stated,

> "I will decide on the papers that the Court has. If I reach the conclusion that I cannot enter a fair decision on any of these points, that I may need additional argument, that I may need evidence, I will so decide." *Id.* at (43).

Counsel for Respondents described evidence that it desired to present on the issue of partiality and offered this evidence to the Court, and the Court indicated to Respondents that it would later have that opportunity if it became necessary to try that issue, but that the hearing was then closed. *Id.* at (44). Respondents relied on this understanding from the Court, and the Court

never subsequently allowed trial on the issue of partiality.

(1) THE "TRIAL"

It became apparent early in the fourth hearing that the District Court had determined it needed no evidence on the challenges of the award by Petitioner with the exception of the last challenge, the issue of admission of certain exhibits of Respondent Samford. In short, the Court had resolved the four other challenges in favor of Respondents as matters of law, the Court requiring no proof and basing its decision on the pleadings and the judicial admissions and stipulations of Petitioner to the Court.

The District Court opened the hearing of February 14, 1966 by stating it understood the matter before it to be the challenge made by Petitioner against the award, and that if the Court found there was no merit in the challenge, the Court would enter judgment in accordance with the award. A. 87. Mr. Romero, counsel for Petitioner, responded that this understanding of the Court was correct. *Ibid.*

The Court then stated that the burden of proof was on Mr. Romero (as counsel for the objecting party, Petitioner) and Mr. Romero replied that the Court was correct. *Ibid.*

To open Petitioner's case Mr. Romero first outlined all the various challenges of Petitioner to the award. As to the two objections as to when hearings were held by the arbitrators and when the award was rendered, Mr. Romero again admitted that the procedure followed by the arbitrators and the parties had been expressly agreed to and stipulated by the parties. A. 90.

(a) ANOTHER DISCLAIMER OF PARTIALITY

In Mr. Romero's statement of the partiality issue in his outline of contentions, Mr. Romero again made it clear by judicial stipulation that Petitioner admitted Mr. Capacete was not *actually* partial:

> "Mr. Romero: . . . One of the allegations is that one of the arbitrators had prior business relationships with one of the parties, which fact was not disclosed to this plaintiff Commonwealth Coatings. *We want to make it known that we are in no way attacking the arbitrator's integrity. We believe him to be an honorable man.*
>
> "The Court: *I believe you have said that all the time that you have come in here.*
>
> "Mr. Romero: We are attacking the other party who knew and should have known that this was a matter to be disclosed . . . ." A. 88. (Emphasis added.)

The same disclaimer had been readily made by Petitioner to the Court in the previous hearings. R. IV, 137 (2); A. 75, 80, 81.

(b) THE COURT'S RESTRICTION OF TRIAL TO THE SOLE ISSUE

Petitioner apparently planned to present testimony on the issue of Respondents' alleged duty to disclose. A. 91. The Court immediately interrupted this by limiting the hearing to another issue, the admission of certain exhibits by Respondent Samford on the last day of the arbitration hearing, stating,

> "The Court: No, let me hear the other party. As far as I have been able to ascertain from what

you have stated, *this hearing could be very short, if we take the record of what happened before the arbitrators.* If they agree that the Court may, as regards some of your challenges, go into those hearings *to show that these documents were presented lately and you were not permitted—.*" A. 91. (Emphasis added.)

Mr. Romero then interrupted the Court because trial on this issue alone would change his presentation of the case,

"I will have to bring testimony of the arbitrators themselves, Your Honor." *Ibid.*

The Court asked for Mr. Currie's remarks on behalf of Respondents. In addressing himself to the first issue mentioned by Mr. Romero; the issue of partiality, Mr. Currie began to reply to derogatory implications made by Petitioner concerning the letter written by Mr. Currie which stated in part that Petitioner could, with the consent of Respondent Samford, nominate another arbitrator to replace its deceased arbitrator so long as the new arbitrator did not have an interest in the litigation and was not involved in the litigation. The Court interrupted Mr. Currie, to say,

"That argument [of Petitioner], I am not going to pay any attention to that.

"Mr. Currie: *No need to go into that?*

"The Court: If they have the right [to impose the same condition] they should have exercised it, regardless of whether your client insisted on that requirement as to the other arbitrator." A. 92.

Mr. Currie then turned to the remaining issues raised by Mr. Romero, the issues of admission of exhibits, holding of hearings on Sunday and Labor Day, and the

rendering of the award more than thirty days following close of the oral hearings. A. 92-95.

The Court then commented on two of the allegations of Petitioner, the allegation as to the effect of the restraining order and the allegation the award was void by reason of having been entered more than thirty days following the close of the oral hearings. A. 96. As Mr. Currie began to deal with these subjects, the Court stopped Mr. Currie, saying, "I don't believe you need to deal. I have heard Mr. Romero and *I believe the Court isn't going to accept those challenges.*" A. 96. (Emphasis added.)

The Court having indicated how it would rule on these issues, Mr. Currie then sought the advice of the Court concerning what else might be furnished by Respondents in the way of clarification of what was to be decided at the hearing,

> "All right sir. Well, with that, is there any other area of the case where Samford may respond to further clarify the issues to be decided at this time?" A. 96-97.

The Judge stated that the only issue the Court was concerned with was the issue of admission of exhibits, stating,

> "Well, *the only thing I am concerned with and I believe I should hear something about it, is the fact that Mr. Romero has stated today that they were not permitted to examine evidence and to offer evidence to rebut certain documents and so forth, which that (sic) goes to the very essence of the arbitration award,* because the arbitration award is based simply on partial evidence from one of the parties and the other party isn't permitted to rebut that evidence or to bring other evidence to answer it, then I believe that goes to the merits of

the award, and the Court may be justified in vacating the award and sending the case back to the Board of Arbitrators, or any other arbitrators to pass on the question." A. 97.

Mr. Currie then attempted to present some background information concerning the procedures followed in the hearing and the qualifications of the parties involved, but the Court responded that this did not answer Mr. Romero's allegation concerning the *admission of documents*, commencing the following colloquy between the Court and counsel for both parties immediately preceding the taking of testimony at the hearing:

"The Court: That still does not answer Mr. Romero's allegation that they were deprived of examining those documents, of the necessary time to come to the Arbitration Board with evidence to rebut those documents or explain those documents. That's what he says, and *that's what the Court is interested in.*

"Mr. Currie: We would respectfully disagree. We state there was ample and total opportunity. There was no objection, no request for additional time, and they did have full privilege to examine everything and cross examine *and we are ready to submit proof and if that's the only issue before the Court I will not address myself further.*

"The Court: *I believe that's the only issue at this hearing.*

"Mr. Romero: *If that's the only issue the Court will hear* I will change my order and call as my first witness Mr. Dwight Chapman." A. 98-99. (Emphasis added.)

After hearing a general summary of allegations made by Petitioner, after again hearing another admission

by Petitioner as to the integrity of Mr. Capacete and the fact that Petitioner was not attacking Mr. Capacete but Respondent Samford, after again hearing from Petitioner that the procedure followed by the Board for the holding of hearings on Sundays and Labor Day and for the rendering of the award more than thirty days after the close of the oral hearings had been stipulated to by both parties, and since the issue of the effect of the bankruptcy restraining order could be resolved on the pleadings, *the Court determined that it needed to hear evidence only on the issue of the question of the propriety of the admission of the exhibits submitted by Respondent Samford on the last day of hearing.* Nothing could be plainer than the language immediately quoted above showing *what issue was to be tried in the District Court at the hearing and that this issue, the admission of certain exhibits, was the sole issue.* In a word, the Court felt that if a meritorious objection to the admission of an exhibit had been made by Petitioner, this would be dispositive of the case, and with the express consent of Petitioner, the case would be sent back to the same Board of Arbitrators.

(c) THE DECISION OF THE DISTRICT COURT CONFIRMS THAT THE SOLE ISSUE TRIED WAS THE PROPRIETY OF ADMISSION OF CERTAIN EXHIBITS.

As subsequently reflected by the decision of the District Court, as to the issues of the effect of the restraining order and the rendering of the award more than thirty days following the close of the oral hearing, the Court stated that these issues:

> "... were dealt with at the hearing of Feb[illegible]ry 14, 1966, and the Court indicated (p. 1[illegible] Tr.)

that it was not impressed by them. The opinion of the Court has not changed, and they are overruled." A. 184-185.

As to the issue of holding hearings on Sunday, the Court indicated its prior opinion by stating in its decision that the objection of Petitioner was "too frivolous to merit discussion." A. 185. In other words, at the February 14, 1966, hearing the Court felt that as a matter of law it could resolve these issues without the taking of testimony, and the Court so ultimately ruled; the Court had resolved the restraining order on the pleadings, and Petitioner had agreed to the other procedures followed by the Board to which it later took exception.

As to the issue of partiality, the District Court grounded its decision on the fact that Petitioner had "expressly disclaimed any such imputation [of bias, partiality or fraud on the part of Mr. Capacete]." A. 185. And the Court noted further that Petitioner had failed to offer any evidence of "evident partiality" which, as the Court interpreted the standard under the Federal Arbitration Act, was understood by the Court to mean no evidence of any *actual* partiality. Plainly the Court felt on the issue of partiality that Petitioner not only did not intend to offer any proof of actual partiality but expressly disclaimed any such actual partiality, and accordingly at the trial there was no evidence to receive on that issue. In short, the District Court felt that the disclaimer by Petitioner of actual partiality resolved the issue, and no testimony was warranted.

(d) THE TESTIMONY

These conclusions about the framing of the issue prior to the taking of testimony and the reasons why

the Court limited the issue at trial to the issue of admission of exhibits are conclusively confirmed by numerous incidents during the taking of testimony where one party or another would begin to stray from the sole issue of admission of exhibits and the Court would quickly caution the party to return to the issue. The incidents occurred chronologically as follows:

(1) During cross-examination by Mr. Currie of the first witness, Mr. Dwight L. Chapman, the arbitrator appointed by Respondent Samford, when Mr. Currie asked Mr. Chapman to describe the initiation of the arbitration proceedings and the appointment of arbitrators, the Court interjected,

> "I believe we are losing time. I don't want any dilatory tactics. We are only inquiring about what they claimed. *That the documents came at the 11th Hour, that they weren't permitted to bring evidence to rebut the contents and the Board took the contents of those documents as a bible.*" A. 107. (Emphasis added.)

(2) Then, as Mr. Currie began to offer for admission into evidence at the trial certain documents, the Court stated,

> "The only bearing that any document as to the issues would have, would be that Mr. Romero on behalf of his client *waived the necessity of offering these documents* or *admitted that these documents were to be presented to the arbitrator and that they would have no objection to their admission,* and *he would have no evidence to rebut the documents,* but otherwise I don't think this has any materiality to the issue we are discussing here. All this does is tend to confuse the issue.
>
> "Mr. Currie: Then we will go to the immediate issue at hand. . . ." A. 109-110. (Emphasis added.)

This issue, of course, was the admission of documents into evidence.

(3) After another question and answer, the Court interrupted,

> "You see, we are wasting time. He is testifying about the general hearings. *All we are concerned with here is these documents*, identified as Identification 1 for plaintiff and which they claim were presented on September 2. That's all." A. 110-111. (Emphasis added.)

The documents referred to by the Court were those alleged by Petitioner to have been admitted over its objection.

(4) Shortly thereafter, and just prior to the noon recess, when the witness was referring to his notes to determine a detail about the hearing, the Court suggested to aid in determining whether Petitioner had made an objection and whether Petitioner had had enough time to review Respondent Samford's exhibits,

> "Well, I have to go to the doctor now. We will take a recess until 1:30. In the meantime, you try to refresh your recollection from your notes so that you may be able to testify exactly as to what questions of time and whom you saw and what you saw and what Mr. Romero or his client did and so forth, because that will be more illuminating than anything." A. 115.

(5) After the recess, when Mr. Currie continued with his examination of Mr. Chapman, and asked Mr. Chapman to amplify his previous testimony concerning what the Board of Arbitrators had asked the parties to supply in the way of documentation, and Mr. Chapman began to answer what things were necessary to be

considered to reach a decision on the case, the Court again directed attention to the single issue of whether certain documents were admitted over the objection of Petitioner, in the following language:

> "The Court: The question here isn't what you [Mr. Chapman] had to consider regarding that. *I believe the issue to be tried here is that some certain documents were submitted which are these documents, that they were submitted by the defendants or by Samford to the Board of Arbitrators and that the Plaintiff did not have any opportunity to consider those documents, to bring evidence as regards the matters in those documents and so forth, because the Board of Arbitrators closed the hearings and wouldn't permit them to. That's what is in evidence before the Court, not what they did or may have done.*" A. 117. (Emphasis added.)

(6) At the end of the testimony the Court again reminded the parties that the *only issue* before the Court at this hearing was whether Petitioner had made objections to admission of exhibits of Respondent Samford. The Court stated,

> "Anyway I want counsel to understand me clearly. *The only issue that is important to me is that issue about whether the Arbitration Board against your objections considered these documents without giving you an opportunity to look at those documents and examine them and challenge the validity of the documents or explain that they didn't mean what they purported to mean.* No matter whether they were engineers, experts, you could have brought somebody else to show that they were wrong. Of course the evidence is contradictory. You have testified one way and Mr. Chapman and Mr. Capacete and Mr. Martinez have testified the other way. The only piece of evidence we

had in order to clarify the situation was this tape recorder. This tape recorder may show that you objected and they did not pay any attention to your objection." A. 177-178. (Emphasis added.)

(e) THE DISTRICT COURT RECOGNIZED THAT THE ISSUE OF EVIDENT PARTIALITY HAD NOT BEEN TRIED.

At several times during the trial, the Court indicated it would rule against Petitioner on the issue of evident partiality, this ruling being based on the admissions made in Court by Petitioner. See p. 28, *infra.*

After the testimony had been taken and as the Court was bringing the hearing to a close, suddenly at this point in the proceedings Mr. Korngold, co-counsel for Petitioner, addressed the Court and attempted to raise another issue, saying, "I have one other issue." A. 179.

The Court responded by commenting on the procedure to be followed in the transcribing of the tape, but Mr. Korngold attempted to address the Court's attention to another issue, "It is on a completely different point, Your Honor." A. 180.

When the Court understood that Mr. Korngold was referring to a different subject, the issue of "evident partiality," the Court asked, *"Why did you not raise that different point when I said the only issue here is this?" Ibid.* Mr. Korngold then attempted to argue that he had raised the point previously, but the Court stated that on the issue of "evident partiality," he had, ". . . already decided to rule against you [Petitioner], period." *Ibid.*

Recognizing that the issue tried was that concerning the admission of exhibits, and not the issue of evident

partiality, the Court advised Mr. Korngold of the procedure it would follow if Petitioner desired to address the Court further on the issue of evident partiality. The following discussion occurred:

> "The Court: No, you have the opportunity, as I am not deciding that case now, you will have the opportunity of asking the Court to reconsider.
>
> "Mr. Korngold: That's what I am asking now.
>
> "The Court: All right, you are asking me now and I say I will give you time later on but I am not going to hear anything further here. It is almost five.
>
> * * *
>
> "The Court: You have heard my position. I am not deciding anything, even as to the points I said that I was going to rule against you. After I give a decision you might come in and say, we want to convince you to reconsider.
>
> "Mr. Korngold: I just wanted to let you know there was more than one issue as to the Commonwealth Coatings position. That's why I wanted to make the record clear." A. 180-181.

Although the decision of the District Court was adverse to Petitioner on the issue of evident partiality, Petitioner did not seek reconsideration by the District Court and request an opportunity to present testimony in support of its position on that issue.

C. RESPONDENTS ARE ENTITLED TO A TRIAL OF THE CASE UNDER THE "APPEARANCE" STANDARD OF "EVIDENT PARTIALITY", AS ANNOUNCED BY THE SUPREME COURT.

As the District Court plainly viewed the test applicable to Mr. Capacete to be whether or not he was *actually partial*, and because of the admissions of

Petitioner the District Court did not allow testimony on the issue of partiality, Respondents are entitled to a trial under the "appearance" standard of "evident partiality" as announced by this Court. This Court has held, in effect, that the District Court erred as a matter of law in following the standard it used to evaluate the challenge of "evident partiality."

Since the District Court resolved this issue as a matter of law on the basis of the admissions in open court of Petitioner and without testimony, and since this ruling was found erroneous by the majority opinion in this case, *testimony is now mandatory in order to present the remaining essential defense to a charge of "evident partiality" under the "appearances" test, namely that Petitioner had knowledge of the prior relationship of which it now complains.*

(1) ON A NEW TRIAL RESPONDENTS WILL PROVE THAT PETITIONER HAD KNOWLEDGE OF THE ALLEGEDLY DISQUALIFYING RELATIONSHIP.

The affidavit of A. C. Samford, Jr. and Roger Dickinson, executive officers of Respondent Samford during the occurrence of the events relevant to this proceeding, and the affidavit of counsel for Respondents (originals on file with the Clerk of the Court) are printed in the Appendix to support this Petition for Rehearing. See p. 46, *infra*. These affidavits show that there is every reason to believe that Petitioner knew of the previous business relationships.

Representatives of Petitioner, both management and counsel, were continually in contact with Respondent

Samford and their counsel. Petitioner has vehemently complained that certain services by Mr. Capacete or his firm were performed on the same projects involved in this same arbitration. It is highly significant that Petitioner was the painting subcontractor of Respondent Samford on *all* of its principal projects in Puerto Rico, and since the work performed by Mr. Capecete or his firm was not secretive, but was performed in daylight, in the open, and known to many, Respondents believe that it can be shown Petitioner had knowledge of the performance of these services.

The representatives of Petitioner, especially its chief executive in Puerto Rico, Manuel Nieto, were regularly and frequently in the offices of the Samford Companies in Puerto Rico, generally at least weekly, from the time the painting contracts were entered into with Petitioner in 1960 and 1961 through the abandonment of the work by Petitioner in July, 1962, and often thereafter during settlement negotiations, the representatives of the parties were in frequent contact.

The affidavit of Messrs. Samford and Dickinson describes in detail a particular incident occurring on the Laundry Project of Respondent Samford at the Puerto Rico Medical Center where Petitioner was the painting subcontractor. In order to resolve the dispute between the owner and Respondent Samford involving a floor topping problem, Mr. Capacete was engaged by Respondent Samford to testify as to the causation. Although the parties were originally to arbitrate the matter, due to the eminent reputation of Mr. Capacete as an expert and man of honor, the owner agreed to abide by Mr. Capacete's decision in lieu of arbitration. This development and victory was widely known and

discussed in the construction industry in Puerto Rico and especially among prime and subcontractors on the Puerto Rico Medical Center. Petitioner was a subcontractor of Respondent Samford there and was performing painting work on the project during the same period as this Laundry Project dispute and negotiations of this dispute using Mr. Capacete's services. Accordingly, Respondents submit and believe that it can be shown Petitioner had knowledge of these particular services, and Respondents earnestly request that the opportunity be provided to make this showing to prevent unjust results of a decision based on facts and issues never tried by the parties or lower court.

II. THE COURT ERRED IN FAILING TO CONSIDER THE ADMISSION OF PETITIONER THAT MR. CAPACETE WAS INNOCENT OF ANY ACTUAL PARTIALITY, BIAS OR IMPROPER MOTIVE, WHICH ADMISSION NEGATES ANY POSSIBLE APPEARANCE OF WRONGDOING.

This Court in its opinion states,

> "It's true that *petitioner does not charge before us that the third arbitrator was actually guilty of fraud or bias in deciding this case*, and we have no reason, apart from the undisclosed business relationship, to suspect him of any improper motives." (Emphasis added.)

Respondents respectfully submit that to view the numerous admissions by Petitioner as to the honesty and integrity of Mr. Capacete and the statements of Petitioner that it was not attacking Mr. Capacete, but Respondent Samford, as a mere *absence of a charge* of

fraud or bias on the part of Mr. Capacete is an inaccurate statement and evaluation of the actual facts of the case. It is one thing not to charge actual partiality, and it is an entirely different matter, and a far more meaningful circumstance, to plainly admit in open court that there is no actual partiality.

The decision of the Court and the concurring opinion in effect adopt an "appearance" test of when an arbitrator should be required to volunteer information about previous relationships. In the words of the Court's opinion,

> ". . . the single requirement [is] that arbitrators disclose to the parties any dealings that *might create an impression of possible bias.*" (Emphasis added.)

The fact of the case, however, as recognized in the dissenting opinion of Mr. Justice Fortas, is that Petitioner has freely and repeatedly admitted that there was in fact no actual bias of any sort and that Mr. Capacete was not affected in any respect, consciously or subconsciously, by the past, terminated business relations.

Surely, at some point, reality can overcome appearances. The Court has observed that apart from the "undisclosed business relationship" there is no reason to "suspect" Mr. Capacete of any improper motives. If the Court has any doubt, or any "suspicions" about the effect of the business relationship, surely the number of admissions of the lack of such effect of such relationships readily made by Petitioner entirely dispel any such suspicion. Just as no "appearance" of interest will arise where a party apprised of a damaging fact freely waives it, so here that Petitioner repeatedly dis-

claimed in public any wrongdoing by Capacete *must* vitiate any appearance of "possible bias." To find otherwise, it is most respectfully submitted, is to cause a most unjust result requiring that appearances control over the reality of the situation, and to impose a harsh and formalistic rule requiring a severe result to cure a supposed evil *which in fact is admitted not to exist.*

A. THE ADMISSION BY PETITIONER

We would entreat the Court to review the following portions of the record where Petitioner entirely disposes of any imputation of actual partiality on the part of Mr. Capacete:

In the hearing before the District Court, held June 25, 1965, Mr. Romero, counsel for Petitioner, stated,

> "*. . . this isn't an allegation of fraud against the arbitrators . . . .*" R. IV, 137 (2). (Emphasis added.)

Mr. Korngold, New York counsel for Petitioner, then added unequivocally,

> "I would like the record clear that *at no time is Mr. Romero or myself accusing any of the arbitrators with doing anything fraudulent.*" R. IV, 137 (2). (Emphasis added.)

At the hearing before the District Court on July 16, 1965, Mr. Romero again stated,

> "*Now, we don't mean to say that we believe that the chairman acted improperly in any way . . . .*" A. 75. (Emphasis added.)

The District Court shortly thereafter summarized the position of Petitioner by stating,

> "I know Mr. Capacete pretty well and I know his caliber as an engineer and as a man of science,

there is no doubt. *And I believe that nobody here is trying to raise any reflection whatsoever on the ability, honesty and integrity of Mr. Capacete . . .*" (A. 80) (emphasis added),

to which Mr. Romero for Petitioner responded,

"*That's our position and we have so stated numerous times.*" A. 81. (Emphasis added.)

At the hearing before the District Court on February 14, 1966, Mr. Romero for Petitioner once again admitted that it was making no challenge of the integrity of Mr. Capacete and, in fact, the Court was assured of Mr. Capacete's honor,

"*We want to make it known that we are in no way attacking the arbitrator's integrity. We believe him to be an honorable man*" (A. 88) (emphasis added),

to which the Court responded,

"I believe you have said that all the time that you have come in here." A. 88.

Mr. Romero, on direct examination by his associate counsel representing Petitioner, in answer to the question whether he would have objected had he known of the previous business relationship between Samford and Foundation Engineering Company, answered in part,

"I don't think I would have objected because I know Mr. Capacete . . . ." A. 151.

The District Court thereafter in its decision twice stated that it found as a fact that Petitioner,

"*. . . disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved. . . .* it also has *expressly disclaimed any such imputation* [of evident partiality] . . . ." A. 185. (Emphasis added.)

And the Court of Appeals expressly confirmed the District Court's conclusions, holding,

> ". . . the [District] Court was well warranted in finding that *there was no prejudice or bias* manifested in the course of the proceedings. Indeed, *there was considerable evidence which negatived it.*" 382 F.2d 1010, 1012; A. 194. (Emphasis added.)

B. PETITIONER RATIFIED AND CONFIRMED THE TOTAL IMPARTIALITY OF MR. CAPACETE AS AN ARBITRATOR.

Petitioner's concurrence in the fairness and impartiality of Mr. Capacete was absolutely confirmed when Petitioner resubmitted certain issues to the arbitrators following the award and later expressed unqualified willingness to the District Court to resubmit matters to the same Board of Arbitrators. Following the rendition of the award and after Petitioner had commenced suit challenging the award on the various grounds, including the ground of "evident partiality," on March 10, 1964 Petitioner sought reconsideration of the award from the same Board of Arbitrators without objection as to their qualifications to hear the matter. Respondent Samford filed two briefs responding to this motion on March 18, 1964 and August 1, 1964. However, the arbitrators took no further action in the matter following the award.

At the opening of the trial of the case, when the Court focused attention on the sole issue of admission of exhibits, the Court stated,

> "Perhaps that may require that I resubmit the case to the arbitrators and have an additional

> hearing in which you are permitted to go over those documents," (A. 91);

Mr. Romero expressed his total consent to this remedy, saying, "All right." *Ibid.* Later the Court had occasion to mention again it might, "send the case back to the Board of Arbitrators," but Petitioner took no exception to this possibility. A. 97. Following the testimony concerning whether Petitioner had made objections to the introduction of certain exhibits by Respondent Samford and in the discussion of what procedure would be followed if such an objection had been made, the Court again suggested the possibility of having the arbitration issues decided again by submitting the record to the same Board. The only comment by Petitioner's counsel was that he believed the Board had expressed that it would feel "very bad" about considering the case any further. A. 174. The Court responded:

> "The Court: I don't believe so. *I believe the Court may rule that the case be resubmitted to the Arbitration Board, for them to consider all the evidence,* give the opportunity if it is shown that you made an objection and you asked for time to rebut that evidence, and *that they receive that evidence and rule on it, because otherwise it would be in a certain way unfair to these arbitrators. I don't find that there is anything wrong about it, and there have been no charges as to the honesty, ability, or anything like that,* but that the best thing, you have to show that, because I am not going to rule on that unless it is shown by the record that you made timely objections to vital documents and that they refused to hear those objections, that you requested time to present evidence to contradict the contents of those documents or to explain them in a way different from what the Board finds. A. 174-175. (Emphasis added.)

Throughout this discussion of resubmittal of the case to the Board of Arbitrators, Petitioner made absolutely no objection to the same Board's ability to enter a new, valid, binding arbitration award.

It can be fairly and correctly said that Petitioner ratified and confirmed the qualifications of the arbitrators by being ready and willing to resubmit the case to the same Board. Obviously, Petitioner would not have been at all so inclined if it believed that Mr. Capacete was to the least extent motivated in favor of Respondent Samford.

III. IF MR. CAPACETE HAD BEEN SERVING AS A "JUDGE OR JUROR," HE WOULD NOT HAVE BEEN DISQUALIFIED FOR INTEREST.

A. DISQUALIFICATION OF JUDGES

The majority holding of this case is that a duty to disclose information on relationships between an arbitrator and a party to the proceeding exists when the relationship would disqualify a judge or foreman of a jury in similar circumstances; failure to observe this duty, even if the party "innocently forgets," would constitute "evident partiality" under the United States Arbitration Act, 9 U.S.C. §10, and require vacation of the award. Whether Mr. Capacete's relationship to Respondent Samford would be disqualifying if he were a judge or foreman of a jury in a court action has not been subject to proof in any of the court proceedings below or appellate hearings thereafter, but the facts of the record amply demonstrate he would not be disqualified.

With regard to the disqualification of judges for

"interest" in the subject matter before them it is a well-settled rule that the relationship must involve or create a "substantial" interest before disqualification will be required. Congress confirmed this principle by changing the language of 28 U.S.C. §455, "Interest of Justice or Judge" from,

> "Any justice or judge of the United States shall disqualify himself in any case *concerned in interest in any suit* . . ." (emphasis added)

to,

> "Any justice or judge of the United States shall disqualify himself in any case *in which he has a substantial interest* . . . ." (Emphasis added.)

While legislative history is silent on this point[1] it is apparent from the literal language of the statute that Congress meant to raise the threshold above which disqualification would be required. An example of the proper application of the aforesaid statute is *Lampert v. Hollis Music Inc.*, 105 F.Supp. 3 (D.C.E.D.N.Y. 1952). In that case the judge was not held to be disqualified under §455 because he owned 20 shares of one of the corporate defendants. Over thirteen million shares of stock were outstanding. To say that the existence of a pecuniary interest, however small, and without more, would automatically disqualify a judge is incorrect as *Lampert* indicates.

The case of *Tumey v. Ohio*, 273 U.S. 510 (1927), cited in the majority opinion does not support or provide authority for the Court's decision. There the U.S. Supreme Court found the direct, present, not past, pecuniary interest of the mayor-judge to be substantial, saying:

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[1] H. R. REP. No. 308, 80th Cong., 1st Sess. (1948).

> "The mayor received for his fees and costs in the present case $12, and from such costs under the prohibition act for seven months he made about $100 a month, in addition to his salary. We can not regard the prospect or receipt or loss of such an emolument in each case as a minute, remote, trifling or insignificant interest." 273 U.S. 510, 531-32.

This finding was essential for the Court had concluded earlier:

> "From this review we conclude that a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law unless the costs usually imposed are *so small* that they may be properly ignored as within the maxim de minimis non curat lex." (Emphasis added) 273 U.S. 510, 531

The dictum of the *Tumey* Court which is quoted by the majority opinion in saying, ". . . in *Tumey* the Court held that a decision should be set aside where there is 'the slightest pecuniary interest' on the part of the judge . . ." was used by the *Tumey* Court in rebutting the State's argument that "old process is due process" and referred to common law practice in England prior to 1776. It is respectfully submitted that in fact judges today will be disqualified only when there is an interest in the subject matter that is substantial, notwithstanding that it is pecuniary. Here Mr. Capacete had no interest whatsoever in the subject matter.

The amount of compensation received by the arbitrator from past business with Respondent is important on the question of "substantiality"; however, other

factors are equally important. The method of negotiating the fee of Mr. Capacete's company is critical, for the compensation may have been only cost and without profit. The total operating budget of Respondent Samford is pertinent, as is the presence or absence of similar testing firms on the subject construction jobs. The change of ownership, management, and operations of Respondent further demonstrates the absence of a personal interest by Mr. Capacete in the proceeding's outcome. None of these facts were shown below because the rule of law under which the District Court resolved the issue of partiality did not require such proof and the District Court did not permit testimony on the issue.

A further consideration that goes into the decision of a judge's qualification to hear a certain matter is whether or not the interest in the subject matter is a "present" interest, as opposed to a "past" interest. The United States decisions require that the judge's interest be a "present" one before disqualification will be found.[1] A good example is the rule governing the propriety of judges hearing cases that are argued before their court by ex-law partners. Here Mr. Capacete had appearing before his arbitration panel a party with which he had had a past professional relationship, not nearly so close as that of law partners. It has been found by one distinguished author, Mr. John B. Frank in "Disqualification of Judges," 56 *Yale L. J.* 605 (1947), that the overwhelming practice in the United

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[1] *Darlington v. Studebaker-Packard Corp.*, 261 F2d 903 (7th Cir. 1959), *cert. denied* 359 U.S. 992 (1959) (former client of judge was a party); *Johnson v. Marietta & N.G.R.R.*, 70 Ga. 712 (1883) (judge was a former director of a corporate party).

States judicial system is not for a judge to disqualify himself where an ex-law partner argues before him. Mr. Frank found no single instance of disqualification. This Court has affirmed the rule in this regard more than once, the most famous occasion being the case of *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161 (1945), *rehearing denied*, 325 U.S. 897 (1945).

In the present case Mr. Capacete's associations with Respondent ceased more than a year before the arbitration of 1962.[9] No other relationship or independent interest that would disqualify the arbitrator has been suggested by Petitioner.

A third element found in the disqualification of judges for "interest," is "directness." An example of the required "directness" is found in the following quotation from *Petition of Farber*, 260 Mich. 652, 660-661 (1932):

> "Where a judge or corporation in which he is a stockholder is not a party to the suit, the interest which will disqualify him must be a direct interest in the subject matter of litigation or in the outcome of the suit, so that he or the corporation will be directly affected through pecuniary or property loss or gain or accrual of right or liability."

Note that "directness" as explained here does not mean lack of an intermediary or conduit, but refers to the personal or direct receipt of the benefit or loss involved.

The best example of "directness" is found in the *Tumey* case, *supra*. There the Court noted that it would violate due process if ". . . the judge . . . has a *direct*, personal substantial pecuniary interest in reaching a

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[9] A. 139.

conclusion against him . . . ." (Emphasis added.) The Court then found a "direct pecuniary interest" because there was ". . . no way by which the mayor may be paid for his service as judge, if he does not convict those who are brought before him." 273 U.S. at 520.

It is respectfully submitted that there is no evidence Mr. Capacete had a "direct" interest in the arbitration proceeding, and should this issue be subjected to proof in a new trial this conclusion will be established beyond doubt.

The fourth common element found in the law governing disqualification of judges is a requirement that the interest involved be pecuniary or proprietary in nature. Note that disqualification for "bias" is not an issue in this case. The term "interest" found in the Congressional statutes preceding 28 U.S.C. §455 was initially and has since continuously been defined in terms of the common law meaning, i.e. pecuniary or proprietary.[4]

It is respectfully submitted that what evidence was introduced in lower court proceedings on the nature of Mr. Capacete's interest in the subject matter of the arbitration demonstrates that neither he nor his company had a monetary, proprietary or beneficial interest in the result of that proceeding. The fees for the professional relationship between 1957 and 1961 had been received by Mr. Capacete's company, hence these were not contingent on Respondent prevailing in the arbitration matter. The prospect of future business dealings is not pecuniary or proprietary in the sense used here,

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[4] *Adams v. U.S.*, 302 F.2d 307 (5th Cir. 1962); *U.S. v. Bell*, 351 F.2d 868 (6th Cir. 1965), *cert. denied* 383 U.S. 947 (1966).

and can scarcely be deemed "beneficial" with Respondent Samford phasing out its operations in Puerto Rico,[5] changing ownership, management, and even using Mr. Capacete's competitor for testing services previously provided by Mr. Capacete's firm.

To apply the foregoing legal principles governing judge disqualification to Mr. Capacete conclusively demonstrates that because he did not have a direct and present interest in the subject matter that could be described as pecuniary or proprietary in nature, he would not have been disqualified if serving as a judge or juror in trying this dispute. It is also submitted that further proof on the issue of "substantiality" would absolutely confirm that the interest arising from past professional relationships was not so large as would disqualify a judge or juror in similar circumstances.

B. DISQUALIFICATION OF JURORS

Disqualification of jurors for "interest" in the subject matter of a judicial case revolves around what may be alleged in an objection for "cause" before trial. The juror's "interest" may be direct and personal, or through an intermediary, or it may arise from a relationship the juror has with one of the parties.

It is ironic that the standard used in disqualifying jurors for interest should be used by the Court in determining when a duty to volunteer information exists for an arbitrator under the Arbitration Act. This is because it is hornbook law that a failure by the concerned party to object to the juror in question in a timely fashion will waive the right.[6] This is true even

[5] Brief of Respondents at 146.

[6] *United States v. Ragland*, 375 F.2d 471 (2d Cir. 1967), *cert. denied* 390 U.S. 925 (1968); *Fabian v. United States*, 358 F.2d 187 (8th Cir. 1966), *cert. denied* 385 U.S. 821 (1966).

when the disabling fact is unknown to the party, provided other facts are known which put him on notice to the advisability of an investigation and due diligence would have revealed the critical data.[7] In the instant case, the natural obligation to exercise due diligence in investigating was discarded in favor of an unknown, unreasonable, and unnatural "duty" to volunteer placed upon the other party, but the substantive law as to when that duty exists was partially borrowed from the law governing jury challenges and qualifications.

The judicial standards governing juror disqualification are drawn from statutes and the common law. Until 1948 the qualifications of federal jurors were determined in accordance with those required by the highest state court of the state in which the federal court sat.[8] Now the federal statutory law on the subject is found in 28 U.S.C. §1863 which permits "(a) . . . district judge for good cause . . ." to exclude a person from jury service. Section 1870 of Title 28 of the U.S.C. allows the court to determine "All challenges for cause or favor . . . ." Discretion is vested in the trial judge to determine what qualities or factors will cause actual prejudice or fundamental unfairness. Preexisting case law on the subject will be and is drawn on heavily.

It is clear that a pecuniary or proprietary interest in the matter at bar will, unless waived, disqualify a prospective juror. The most common example of this is where a prospective juror is a stockholder in a corporation that is either a party in the lawsuit, or has a

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[7] *Batsell v. U.S.*, 217 F.2d 257 (8th Cir. 1954).
[8] Act of March 3, 1911, Ch. 231 §§ 275, 278, 38 Stat. 1164, 1165.

pecuniary interest in it (i.e. as insurer of the defendant in a negligence suit).[9]

The common law will normally disqualify, unless waived, a prospective juror that is *currently* employed by a party,[10] or is closely related to a person that is so employed.[11] But the relationship must be a *current* one and if the person has terminated a past employment relationship it will not be deemed a disqualifying fact,[12] even if objection is made by challenge for cause.

Several types of business relationships have been scrutinized by courts in deciding if a disqualifying interest arises therefrom. Generally an *existing* and *substantial* business relation with a party will permit a challenge for cause. Where the business relationship is terminated, even with an expectation of renewal of the insurance policy in the case, it has been held that there is no disqualification required as a matter of law.[13] Simple business relationships *in the past*, with no more than the ordinary hope of their resumption, have not been deemed disabling.[14] Thus, the business relationship to disqualify a prospective juror must be a *present* relationship. Similarly, other business relationships have been found not disqualifying in view of their insubstantial nature.[15] Presumably this was also the reason why

[9] *Texas Power & Light Co. v. Adams*, 404 SW2d930 (Court of Civil Appeals of Texas 1966); *Ozark Border Electric Cooperative v. Stacy*, 348 SW2d586 (Springfield Court of Appeal 1961).

[10] *Francone v. Southern Pac. Co.*, 145 F.2d 732 (5th Cir. 1944).

[11] *Dodson v. Pennsylvania Railroad Company*, 142 F. Supp. 509 (D.C.W.D. Pa. 1956).

[12] *Missouri Pacific Railroad Co. v. Fikes*, 211 Ark. 256, 200 SW2d 97 (1947); 50 C.J.S. *Juries* §221 (a)(2).

[13] *Katzenbach v. S. C. Johnson & Son, Inc.*, 273 Wisc 621, 79 NW2d 249 (1956).

[14] *Dunagan v. Appalachian Power Co.*, 23 F.2d 395 (4th Cir. 1928).

[15] *U.S. v. Smith*, 306 F.2d 596 (2d Cir. 1962), *cert. denied* 372 U.S. 959 (1963); *Walker v. State*, 237 Ark. 84, 371 SW2d 135 (1963).

the Supreme Court in Oregon thought the relation of physician and patient not disabling.[16] It was also the reason why the Fifth Circuit recently refused to disqualify jurors who were employees or policy holders of an insurance company that was admittedly subrogated to a part of the plaintiff's claim.[17] The Court said that in comparison with other claims of plaintiff in the case, ". . . the financial interest of the insurer by reason of its subrogation rights was relatively minor . . . ." *Id.* at 842.

In the arbitration proceeding in Puerto Rico in 1962, Mr. Capacete did not have a pecuniary or proprietary interest in the matter in dispute for neither he personally, nor any property owned by him, nor his company could benefit or lose as a result of the contemplated award. That Petitioner recovered in its claim against Respondents, or Respondent Samford recovered in its counter claim against Petitioner could not redound to the benefit of Mr. Capacete or his company.

It is obvious that these business relationships of Respondent Samford and Mr. Capacete *would not disqualify* a prospective juror. It was a past, terminated, casual relationship. More than a year before the arbitration, Respondent had begun using the services of a company that competed with Mr. Capacete's company.[18] Thus, there was no contingency present in the arbitration proceeding. Past income, furthermore, was shown to constitute less than 1% of the income of the

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[16] *Mount v. Welsh*, 118 Ore. 568, 247 P. 815 (1926)(dictum).
[17] *L. & N. Railroad Company v. Williams*, 370 F.2d 839 (5th Cir. 1966).
[18] See attached affidavit of Amos C. Samford, Jr. and Roger Dickinson, p. 46, *infra*.

firms in which Mr. Capacete had an interest.[19]

Because Mr. Capacete and his company did not stand to benefit or suffer loss from the arbitration proceeding, it is earnestly submitted to the Court that under the rule as enunciated in this case, the arbitrator would not be disqualified under the standards applied to jurors in the United States and therefore was under no duty to volunteer information on his *past, insubstantial,* terminated relationships with Respondent.

IV. THE DECISION OF THIS COURT IS CONTRARY TO JUDICIAL PRECEDENTS, THE FACTS OF THIS CASE AND CONGRESSIONAL INTENT AS TO THE DUTY OF ARBITRATORS TO VOLUNTEER INFORMATION, AND CREATES A TRULY BURDENSOME AND UNREALISTIC DUTY FOR THE UNTOLD NUMBERS OF ARBITRATORS ATTEMPTING TO RESOLVE DISPUTES IN PRIVATE, INFORMAL PROCEEDINGS.

It is respectfully submitted that the creation of a duty to volunteer information by arbitrators under the United States Arbitration Act, 9 U.S.C. §§ 1-15, is done without support of Congressional legislative history or intent.[20]

The duty is created without the support of judicial precedent, for until this case a failure to volunteer information on a prior business relationship with one of

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[19] Brief of Respondents at 143.

[20] H. R. REP. No. 96, 68th Cong., 1st Sess. (1924); S. REP. No. 536, 68th Cong., 1st Sess. (1924); *Hearings on S. 4213 & S. 4214, before the Subcommittee of the Senate Committee on the Judiciary*, 67th Cong., 4th Sess. (1923); *Joint Hearings before the Subcommittee on the Judiciary*, 68th Cong., 1st Sess. (1924).

the parties would not justify vacation of the arbitration award.[11] Further, the two cases cited in the main opinion of the Court are not in point.

The rule in the *Tumey* case, *supra*, on disqualifying a judge who has a *substantial* pecuniary interest in the case before him (under the Fourteenth Amendment), turns as much on the *direct*, *personal*, and *present* nature of that interest as it does on the substantiality. If the true holding were applied to Mr. Capacete as a judge or arbitrator there would be no disqualification.

The case of *Rogers v. Schering Corp.*, 165 F. Supp. 295 (D.C.D.N.J. 1958), *aff'd* 271 F.2d 266 (3d Cir. 1959), is cited by the Court in support of their setting aside, on constitutional grounds, an award where the decision-maker had "the slightest pecuniary" interest in the case. The *Rogers* case, however, involved parties who had agreed to submit to arbitration under the rules of the American Arbitration Association, one of which requires that arbitrators volunteer any information ". . . likely to create a presumption of bias or which he believes might disqualify him . . ." 165 F. Supp. at 298. Thus, the failure to volunteer there violated a *pre-existing contractual duty* and arrangement equal to inquiry. How one can find in the *Rogers* case the justification to vacate an award because an arbitrator, not bound by the A.A.A. rules as here, innocently failed to tell Petitioner about his past acquaintance and terminated services for Respondent is mystifying.

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[11] *Texas Eastern Transmission Corp. v. Barnard*, 177 F. Supp. 123, (D.C.E.D. Ky. 1959), rev'd on other grounds, 285 F.2d 536 (6th Cir. 1960); *Ilios Shipping & Trading Corp. v. American Anthracite & Bituminous Coal Corp.*, 148 F. Supp. 698 (D.C.S.D.N.Y. 1957), *aff'd* 245 F.2d 873 (2d Cir. 1957).

Finally, Respondent would entreat the Court to reconsider the practical impact of its finding a duty to volunteer by arbitrators. Of necessity this ruling will prolong the private contractual process of arbitration as parties will be unaware of the new rule, or if knowledgeable, they will be at loose ends in knowing what should be volunteered. Even Petitioner's attorney recognized the impracticality of imposing such a duty on arbitrators, for he described arbitrators in the context of a duty to volunteer as: "They are innocent babes in the woods sometimes . . . ,[22] explaining Petitioner's position, "If the arbitrators are not told what their duties are by the people who select them, then they are not in fraud." *Ibid.* Inquiries will be naturally withheld in hopes of later using a prior relationship as grounds for judicial appeal (if the final award is adverse). The total thrust of the new duty is away from a natural reliance on self-interest, competition and the adversarial system and sadly would appear to reward indolence, carelessness, or trickery at great cost in time, money and effort. It is unnatural and unreasonable to believe Petitioner, represented by able attorneys, did not have sufficient interest and diligence to inquire and learn about Mr. Capacete to the full extent it desired and therefore waived all right to object to past, open and easily discoverable facts concerning his qualifications.

It will also produce a great and tragic injustice to destroy the work of so many persons for so many years and force a new arbitration where some witnesses are no longer available, memories are more dull, and there is little or no prospect of obtaining more qualified

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[22] R. IV, 137 (2-3).

arbitrators than these three whose unanimous award is now being attacked.

CONCLUSION

For all the reasons stated herein, Respondents respectfully urge the Court to grant this petition for rehearing and remand this case for further proceedings in the Federal District Court. In the alternative, Respondents request that upon rehearing this Court reverse its earlier decision and affirm the lower court decisions and the arbitration award.

This 17th day of January, 1969.

OVERTON A. CURRIE
Attorney for Respondents
1405 Fulton National Bank Building
Atlanta, Georgia 30303
Telephone 404-521-3800

EDWARD H. WASSON, JR.
DAVID E. WALKER
1405 Fulton National Bank Building
Atlanta, Georgia 30303

FEDERICO RAMIREZ ROS
208 First Federal Building
Stop 23, Ponce de Leon Avenue
Santurce, San Juan, Puerto Rico

On the Brief

APPENDIX TO MOTION
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

Commonwealth Coatings Corporation, *Petitioner* v. Continental Casualty Company, Fireman's Fund Insurance Company and A. C. Samford Overseas, Inc., *Respondents*	No. 14 Affidavit of AMOS C. SAMFORD, JR. and ROGER DICKINSON

A. C. Samford, Jr. and Roger Dickinson, after each was duly sworn by a Notary Public as shown below, made the following affidavit for use in the above case on the basis of their personal knowledge and information and belief which they verily believe to be true and correct.

A. C. Samford, Jr. was born in Tennessee in 1916 and received his Bachelor of Science in Civil Engineering Degree from the University of Minnesota in 1946.

He spent most of his youth in Montgomery, Alabama, where his father was an Executive Assistant to Mr. Algernon Blair's construction company. In 1948, his father moved to Albany, Georgia and established A. C. Samford, Inc. Following World War II, A. C. Samford, Jr. and his brother joined their father in ownership and management of this company which engaged in construction work principally in the southeast and in a joint venture in Spain. Thereafter in 1958, the brother was killed in an airplane collision and A. C.

Samford, Jr. and his father continued to operate A. C. Samford, Inc., as well as A. C. Samford Overseas, Inc., with its main operations in Puerto Rico, and A. C. Samford Virgin Islands, Inc., with its operations in St. Croix Virgin Islands. A. C. Samford, Jr.'s father died in February 1961. A. C. Samford, Jr. served as president of these firms, with his home and main office being in Albany, Georgia.

The construction and business responsibilities of the Puerto Rico and Virgin Island operations were primarily delegated to the offices established on these islands under the responsibility of Don Ross, Vice President and General Manager of these operations. Mr. Ross so served during the period Mr. Capacete's firm, the Foundation Engineering Company of Puerto Rico, was engaged to perform the testing, laboratory and other construction services described in this case. Mr. Ross had the authority and control of making such routine and customary construction decisions as selecting testing firms, subcontractors, suppliers, and otherwise managing the construction operations and business of these Samford firms in Puerto Rico and the Virgin Islands.

A. C. Samford, Jr. primarily devoted his attention to operations in the United States, corporate business affairs and a review of the business reports and records supplied by the Puerto Rico and Virgin Island operations, with occasional visits to these islands to inspect their operations and contribute suggestions for solving problems as a particular situation warranted.

A. C. Samford, Jr. was not a close business, personal or social friend or associate of Mr. Jose L. Capacete.

Mr. Samford never personally employed the services of Mr. Capacete or his firm, such administrative decisions being the responsibility of the local management of the Samford Companies in Puerto Rico and the Virgin Islands, and Mr. Samford worked personally with Mr. Capacete only on the Laundry project problem hereinafter described.

In 1962, and approximately a year before the arbitration hearings, Mr. Don Ross, the Vice President and General Manager of the Puerto Rico and Virgin Island operations when Mr. Capacete's firm was engaged for the services described in this case, resigned from the Samford Companies and moved to Chicago, Illinois to work for a cement company.

Roger Dickinson, who was born in New Jersey in 1936, but grew up in Georgia, received the Bachelor of Building Construction Degree from Auburn University in 1960. While a student, he was first employed by A. C. Samford, Inc., in 1956 as a co-op or working student. After first working in the Albany, Georgia operations, Roger Dickinson in 1960 began work under Mr. Don Ross in the Puerto Rico office. After Don Ross left the Samford Companies in 1962, Roger Dickinson became Vice President and assumed general management responsibilities for the Puerto Rico operations. Beginning a year or more before the arbitration, Roger Dickinson caused the Samford Companies to use the services of the Puerto Rico Testing Services, Inc., a competitor of Mr. Capacete's firm, to provide laboratory, testing and consulting services of a type that had previously been provided by Mr. Capacete's firm. The only work performed by Mr. Capacete's firm for the Samford Companies following the departure of Mr.

Ross occurred on the Laundry project at the Puerto Rico Medical Center hereinafter described.

Upon the departure of Don Ross from the Samford Companies, the management of the Virgin Islands operation was assumed by Dick Schierloh. Mr. Schierloh thereafter did not use the services of the Foundation Engineering Company of Puerto Rico.

In December, 1962 (six months or more before the arbitration), all of the stock of A. C. Samford, Inc., A. C. Samford Overseas, Inc., and A. C. Samford Virgin Islands, Inc., was sold to a construction firm of New York City, the Foundation Company, which was wholly unrelated and unconnected with Mr. Capacete and his firm. A. C. Samford, Jr. was elected President of the New York City construction firm and continued to serve in that capacity for its new Samford subsidiaries. However, his principal office and primary responsibility now involved the New York firm's operations. The absence of any substantial new business in Puerto Rico for a year before the arbitration and other business problems in Puerto Rico and the Virgin Islands resulted in the Puerto Rico operations progressively diminishing and as the current construction work was being completed, the forces were being reduced and the operations were substantially smaller and near their end before the arbitration.

The complete change of ownership, the resignation of Mr. Don Ross, the reduction of operations, the new management of Mr. Roger Dickinson and his engagement and use of a competitor of Mr. Capacete's firm were widely known and discussed in the construction industry in Puerto Rico.

The representatives of Commonwealth Coatings Corporation, especially its Vice President and General Manager, Mr. Nieto, were regularly and frequently in the office of the Samford Companies in Puerto Rico, generally at least weekly, from the time these contracts were entered into in 1960 and 1961 through the abandonment of the work by the Petitioner in July 1962, and many times thereafter during the various conferences and negotiations held to settle the mutual disputes between the parties and commence the arbitration proceedings. Mr. Nieto and other representatives of Petitioner were on all of the projects involved, including those on which Mr. Capacete's firm rendered the services described in the record and briefs. The services rendered by Mr. Capacete's firm were in no way confidential or secret, but customary and routine services which involved performance of work on the project sites in regular day-light working hours. Subcontractors, suppliers, or others working on these projects could clearly see the activities of the representatives of Mr. Capacete's firm, just as they could observe the work and activities of other subcontractors and suppliers.

The Petitioner's Vice President, Mr. Nieto, knew of the Samford Virgin Islands operations. Petitioner's attorney, Mr. Robert Ruskin, also frequently had many discussions with various Samford representatives before and after the abandonment of the work by Petitioners in 1962. Mr. Ruskin, before the arbitration, represented a group that attempted to buy the Samford Virgin Island operations, and he made inquiry about and received information from the Samford representatives concerning the Samford Virgin Island

investments and operations. Mr. Ruskin, a Harvard Law graduate, professed to be knowledgeable of the construction industry and operations in Puerto Rico.

In 1962, a year or more before the arbitration, the concrete topping forming the floor in the laundry on the Puerto Rico Medical Center project separated at many points from the concrete slab. The owner's resident inspector who inspected the work of Samford and other prime contractors and subcontractors, including the painting work of Petitioner on this laundry project, condemned the floor and directed that it be removed and replaced. The laundry equipment had been installed and the laundry was nearing completion, with painting work being performed by Petitioner. The owner's resident inspector who condemned the work had a reputation among the prime and subcontractors working on the Puerto Rico Medical Center as being severely technical and unreasonably difficult to satisfy. When Respondent Samford contested his decision and claimed the floor failure resulted from design defects and demanded arbitration, this became a widely and commonly discussed construction dispute among the prime and subcontractors not only on the Puerto Rico Medical Center, but in the construction industry of the island. After arbitration was demanded and ready to proceed, the owner, the Puerto Rico Medical Center Board, through its Executive Director, upon learning that Respondent Samford had engaged Professor Capacete to testify regarding the cause of the floor difficulty, announced that it would not proceed with the arbitration, but be willing to accept the opinion and judgments of so eminent, honorable and recognized an engineer, expert and professor as Mr. Capacete. This

victory and development was also widely known and discussed by the construction industry in Puerto Rico and especially the prime and subcontractors on the Puerto Rico Medical Center and particularly by the Samford representatives with the Samford subcontractors on the laundry project. The Petitioner, Commonwealth Coatings Corporation, was such a subcontractor working on the project at the time, and A. C. Samford, Jr. and Roger Dickinson believe that Mr. Capacete's services and involvement on this project were known to Petitioner and its representatives. This might explain why the officers, managers and construction supervisors of Petitioner did not testify at the trial, especially why Mr. Nieto, the chief officer of Petitioner in Puerto Rico who was in constant contact with Respondent Samford, failed to testify or even appear at the trial.

The floor topping problem and dispute existed during the time while Petitioner was performing work on this very project, and representatives of Petitioner and Respondent Samford were in continual contact with one another during this period.

A. C. Samford, Jr. and Roger Dickinson did not themselves or with other representatives of Respondents or Respondent's attorney attempt to prevent Petitioner from learning of the terminated and past business relationships of Mr. Capacete's firm and Respondent Samford. They and many other representatives of Respondent Samford did not know what one or more of Petitioner's representatives may have independently known or inquired of one or more of the Samford representatives regarding Mr. Capacete's past business relationships. While they know of no inquiry

from Petitioner, they were fully and reasonably justified in believing Petitioner knew that Mr. Capacete and his firm had performed services in the past for Respondent Samford. They believed and assumed that Petitioner was as pleased and satisfied as each of them were that the other two arbitrators had selected and were successful in obtaining the services of such an eminent, honorable, knowledgeable, and recognized construction expert as Professor Capacete. They learned for the first time that Petitioner claimed to be ignorant of the past relationships when the Petitioner filed pleadings to set aside the arbitration award.

Petitioner's attorney, Mr. Romero, did not advise these or other representatives of Respondent Samford that Petitioner's attorney was a close and personal friend of Mr. Capacete, his neighbor and fellow club member, or that Petitioner's attorney had sought a private conference and the recommendation of Mr. Capacete regarding selection of a replacement arbitrator for this very arbitration. However, A. C. Samford, Jr. and Roger Dickinson believe that Mr. Capacete's character, capacity, integrity and ability did not allow any of these past relationships with Mr. Romero or Respondent Samford to in any way cause his judgment to be biased, partial or affected.

A. C. Samford, Jr. and Roger Dickinson believe Mr. Capacete felt no obligation — social, professional or otherwise—to Respondent Samford and that he had no expectation of future business from Respondent Samford whose ownership had completely changed, and whose Puerto Rico Vice President and General Manager serving during the period described the Petitioner's allegations had resigned, and Respondent Samford's

new representative, Roger Dickinson, had engaged competitors of Mr. Capacete for similar services.

A. C. Samford, Jr. and Roger Dickinson and other officers and representatives of Respondent Samford were not asked by Petitioner about the past services of Mr. Capacete and they had no knowledge that Petitioner did not know of them, but reasonably believed Petitioner had such knowledge, and further, they did not know to volunteer such information which it was assumed Petitioner knew.

Respondent Samford had performed many construction contracts where the owner's architect or engineer was given power to arbitrate or decide disputes regarding interpretations of the contract, liquidated damages and other contract requirements. Such decision-making power is common and customary to the construction industry. The owner's engineer or architect does not report to the contractor or subcontractors previous business, social or personal relationships existing between the architect or engineer and the owner. Mr. Capacete, as an eminent and widely recognized and sought engineer and architect, had no doubt performed such decision-making functions many times and decided disputes between business firms with which Mr. Capacete or his firm had done business. Undoubtedly, such experiences and the absence of complaint or objection about relationships, combined with the fact that Mr. Capacete's and his firm's work was openly done and the laundry floor services were especially well-known in the construction industry and to the contractors and subcontractors on the Puerto Rico Medical Center, all contributed to cause Mr. Capacete to innocently not volunteer to the Petitioner information the

Petitioner had not sought. This is made more reasonable, moral and understandable by the fact that Mr. Capacete knew that Petitioner's attorney, Mr. Romero, knew Mr. Capacete socially and as a friend and knew his professional activities and prominence in Puerto Rico and had talked with Mr. Capacete about this arbitration and had made inquiry as the Petitioner's attorney desired.

This case is the first arbitration proceeding (other than the routine architect-engineer disputes procedure under construction contracts) in which A. C. Samford, Jr., Roger Dickinson, and Respondent Samford have been involved except for one previous Virgin Island construction problem where the parties agreed to waive the three-man arbitration board requirement and jointly selected another Georgia contractor to decide their dispute in an informal fashion. Upon learning of Mr. Capacete's appointment, Respondent reported to its attorneys that the other arbitrators had selected a most excellent, honorable and competent engineer who was preeminently qualified to act as a fair and expert arbitrator.

Petitioner's representatives and attorneys at different times individually talked to different representatives and attorneys of Respondent Samford. There was no system or practical need to attempt to report the details of all such conversation, and there was no way for Respondent to know that Petitioner had not inquired and learned all it desired to know from Respondent's representatives or Mr. Capacete about the past and terminated relationships which involved services which were openly and publicly performed and well-known in the construction industry of Puerto Rico.

A. C. Samford, Jr. and Roger Dickinson swear that any failure, if there were such, to disclose to Petitioner the past relationships of Mr. Capacete was not calculated, but was totally innocent and moral and that Respondent Samford was consciously attempting to cause a lawful, fair and honorable arbitration to decide and forever settle the disputes between Petitioner and Respondent Samford.

/s/A. C. SAMFORD, JR.

/s/ROGER DICKINSON

JURAT

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

Commonwealth Coatings Corporation, *Petitioner* v. Continental Casualty Company, Fireman's Fund Insurance Company and A. C. Samford Overseas, Inc., *Respondents*	No. 14 Affidavit of OVERTON A. CURRIE, EDWARD H. WASSON, JR. and FEDERICO RAMIREZ ROS

Overton A. Currie, Edward H. Wasson, Jr. and Federico Ramirez Ros, after each was duly sworn by a Notary Public as shown below, made the following affidavit for use in the above case on the basis of their personal knowledge and information and belief which they verily believe to be true and correct.

Overton A. Currie (B.B.A., 1948, LL.B., 1949, U. of Miss.; LL.M., 1958, Yale, and Research Associate, Yale Law School Faculty, 1958-59) joined the law firm of Smith, Swift, Currie, McGhee & Hancock, Atlanta, Georgia, (now Smith, Currie & Hancock) in 1959. Edward H. Wasson, Jr. (B.A., 1959, Yale; LL.B., 1962, Harvard) joined the same firm in 1962. Before 1959, this firm served as labor counsel for Respondent Samford and thereafter also provided other legal services.

In 1959, Respondent Samford engaged the firm of the late Victor Gutierrez of San Juan, Puerto Rico as its Puerto Rican attorneys with this account being primarily served by Federico Ramirez Ros (B.A., 1949,

U. of Penn.; LL.B., 1952, U. of P. R.) now of the firm, Ramirez, Segal and Latimer, San Juan, Puerto Rico.

These attorneys and firms independently provided professional services on the various legal matters referred to them by Respondent Samford and sometimes jointly worked on the same matters.

These firms and Messrs. Currie and Ramirez had provided advice to Respondent Samford concerning the floor dispute in the Laundry on the Puerto Rico Medical Center project and knew of the services of Mr. Capacete in connection with this problem, all as described in the affidavit of A. C. Samford, Jr. and Roger Dickinson. They did not know Mr. Capacete had provided other services for Respondent Samford. They knew that Petitioner's representatives and attorneys had separately communicated with them and other representatives of Respondent Samford and did not know what inquiry or information Petitioner may have made or obtained of the other representatives and attorneys of Respondent Samford. For the reasons explained in the affidavit of A. C. Samford, Jr. and Roger Dickinson, it was reasonable for these attorneys to believe that Petitioner knew of Mr. Capacete's services in connection with the floor dispute concerning the Laundry of the Puerto Rico Medical Center project.

These attorneys did not know Petitioner claimed to have no knowledge of the previous services of Mr. Capacete and his firm to the Samford organizations until Petitioner made such allegations challenging the arbitration award.

From the inception of the dispute between Petitioner and Respondents, Petitioner was represented by able

New York and Puerto Rico counsel well-experienced in construction disputes and litigation.

This was the first arbitration case tried by Overton A. Currie and Edward H. Wasson, Jr., and the second arbitration case tried by Federico Ramirez Ros. These three attorneys primarily relied upon and proceeded upon the legal principles and customs that govern a trial in the federal courts, and did advise Respondent Samford not to allow their representatives to discuss or have private communications with the arbitrators regarding the dispute. They knew of Mr. Capacete's reputation as an excellent, honorable and competent engineer, which was recognized and ratified by the Board of the Puerto Rico Medical Center in resolving the laundry floor dispute described in the affidavit of A. C. Samford, Jr. and Roger Dickinson.

Overton A. Currie, Edward H. Wasson, Jr. and Federico Ramirez Ros swear that any failure, if there was such, to disclose to Petitioner the past relationships of Mr. Capacete was not calculated, but was totally innocent and moral and that Respondent Samford was consciously attempting to cause a lawful, fair and honorable arbitration to decide and forever settle the disputes between Petitioner and Respondent Samford.

/s/OVERTON A. CURRIE

/s/EDWARD H. WASSON, JR.

/s/FEDERICO RAMIREZ ROS

JURAT

CERTIFICATE OF COUNSEL

I, Overton A. Currie, counsel of record in the above-styled proceeding, hereby certify that this Petition for Rehearing is presented in good faith and not for purposes of delay.

/s/OVERTON A. CURRIE

Attorney for Respondents

SUPREME COURT OF THE UNITED STATES

No. 14.—October Term, 1968.

Commonwealth Coatings Corp., Petitioner, *v.* Continental Casualty Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[November 18, 1968.]

Mr. Justice Black delivered the opinion of the Court.

At issue in this case is the question whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration.

The petitioner, Commonwealth Coatings Corporation, a subcontractor, sued the sureties on the prime contractor's bond to recover money alleged to be due for a painting job. The contract for painting contained an agreement to arbitrate such controversies. Pursuant to this agreement petitioner appointed one arbitrator, the prime contractor appointed a second, and these two together selected the third arbitrator. This third arbitrator, the supposedly neutral member of the panel, conducted a large business in Puerto Rico, in which he served as an engineering consultant for various people in connection with building construction projects. One of his regular customers in this business was the prime contractor that petitioner sued in this case. This relationship with the prime contractor was in a sense sporadic in that the arbitrator's services were used only from time to time at irregular intervals, and there had been no dealings between them for about a year immediately preceding the arbitration. Nevertheless, the prime contractor's patronage was repeated and significant, involving fees of about $12,000 over a period of four or five years, and the relationship even went so far as to include the

rendering of services on the very projects involved in this lawsuit. An arbitration was held, but the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to petitioner and were never revealed to it by this arbitrator, or by the prime contractor, or by anyone else until after an award had been made. Petitioner challenged the award on this ground, among others, but the District Court refused to set aside the award. The Court of Appeals affirmed, 382 F. 2d 1010 (C. A. 1st Cir. 1967), and we granted certiorari, 390 U. S. 979 (1968).

In 1925 Congress enacted the United States Arbitration Act, 9 U. S. C. §§ 1–15, which sets out a comprehensive plan for arbitration of controversies coming under its terms, and both sides here assume that this Federal Act governs this case. Section 10, quoted below, sets out the conditions upon which awards can be vacated.[1] The two courts below held, however, that § 10 could not be

[1] "In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

"(a) Where the award was procured by corruption, fraud, or undue means.

"(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

"(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controvery; or of any other misbehavior by which the rights of any party have been prejudiced.

"(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

"(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

construed in such a way as to justify vacating the award in this case. We disagree and reverse. Section 10 does authorize vacation of an award where it was "procured by corruption, fraud, or undue means" or "where there was evident partiality . . . in the arbitrators." These provisions show a desire of Congress to provide not merely for any arbitration but for an impartial one. It is true that petitioner does not charge before us that the third arbitrator was actually guilty of fraud or bias in deciding this case, and we have no reason, apart from the undisclosed business relationship, to suspect him of any improper motives. But neither this arbitrator nor the prime contractor gave to petitioner even an intimation of the close financial relations that had existed between them for a period of years. We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge. This is shown beyond doubt by *Tumey* v. *Ohio*, 273 U. S. 510 (1927), where this Court held that a conviction could not stand because a small part of the judge's income consisted of court fees collected from convicted defendants. Although in *Tumey* it appeared the amount of the judge's compensation actually depended on whether he decided for one side or the other, that is too small a distinction to allow this manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in this case. Nor should it be at all relevant, as the Court of Appeals apparently thought it was here, that "[t]he payments received were a very small part of [the arbitrator's] income . . . ."[2] For in *Tumey* the Court held that a decision should be set aside where there is "the slightest pecuniary interest" on the part of the judge, and spe-

[2] 382 F. 2d, at 1011.

cifically rejected the State's contention that the compensation involved there was "so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty . . . ."[3] Since in the case of courts this is a *constitutional* principle, we can see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings and provides that an award can be set aside on the basis of "evident partiality" or the use of "undue means." See also *Rogers* v. *Schering Corp.*, 165 F. Supp. 295, 301 (D. C. D. N. J. 1958). It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

While not controlling in this case, Rule 18 of the American Arbitration Association is highly significant. It provides as follows:

> "Section 18. Disclosure by Arbitrator of Disqualification—At the time of receiving his notice of appointment, the prospective Arbitrator is requested to disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator. Upon receipt of such information, the Tribunal Clerk shall immediately disclose it to the parties, who if willing to proceed under the circumstances disclosed, shall,

[3] 273 U. S., at 524.

> in writing, so advise the Tribunal Clerk. If either party declines to waive the presumptive disqualification, the vacancy thus created shall be filled in accordance with the applicable provisions of this Rule."

And based on the same principle as this Arbitration Association rule is that part of the 33d Canon of Judicial Ethics which provides:

> "33 Social Relations.
>
> ". . . [A judge] should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct."

This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 14.—October Term, 1968.

Commonwealth Coatings Corp., Petitioner, *v.* Continental Casualty Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[November 18, 1968.]

Mr. Justice White, with whom Mr. Justice Marshall joins, concurring.

While I am glad to join my Brother Black's opinion in this case, I desire to add these additional remarks. The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. Cf. *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators.

The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the

parties. In many cases the arbitrator might believe the business relationship to be so insubstantial that to make a point of revealing it would suggest he is indeed easily swayed, and perhaps a partisan of that party.* But if the law requires the disclosure, no such imputation can arise. And it is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award. The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.

Of course, an arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography. But it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed. If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award.

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*In fact, the District Court found—on the basis of the record and petitioner's admissions—that the arbitrator in this case was entirely fair and impartial. I do not read the majority opinion as questioning this finding in any way.

SUPREME COURT OF THE UNITED STATES

No. 14.—October Term, 1968.

Commonwealth Coatings Corp., Petitioner, *v.* Continental Casualty Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[November 18, 1968.]

Mr. Justice Fortas, with whom Mr. Justice Harlan and Mr. Justice Stewart join, dissenting.

I dissent and would affirm the judgment.

The facts in this case do not lend themselves to the Court's ruling. The Court sets aside the arbitration award despite the fact that the award is unanimous and no claim is made of actual partiality, unfairness, bias, or fraud.

The arbitration was held pursuant to provisions in the contracts between the parties. It is not subject to the rules of the American Arbitration Association. It is governed by the United States Arbitration Act, 9 U. S. C. §§ 1–15.

Each party appointed an arbitrator and the third arbitrator was chosen by those two. The controversy relates to the third arbitrator.

The third arbitrator was not asked about business connections with either party. Petitioner's complaint is that he failed to volunteer information about professional services rendered by him to the other party to the contract, the most recent of which were performed over a year before the arbitration. Both courts below held, and petitioner concedes, that the third arbitrator was innocent of any actual partiality, or bias, or improper motive. There is no suggestion of concealment as distinguished from the innocent failure to volunteer information.

The third arbitrator is a leading and respected consulting engineer who has performed services for "most of the contractors in Puerto Rico." He was well known to petitioner's counsel and they were personal friends. Petitioner's counsel candidly admitted that if he had been told about the arbitrator's prior relationship "I don't think I would have objected because I know Mr. Capacete [the arbitrator]."

Clearly, the District Judge's conclusion, affirmed by the Court of Appeals for the First Circuit, was correct, that "the arbitrators conducted fair, impartial hearings; that they reached a proper determination of the issues before them, and that plaintiff's objections represent a 'situation where the losing party to an arbitration is now clutching at straws in an attempt to avoid the results of the arbitration to which it became a party.'"

The Court nevertheless orders that the arbitration award be set aside. It uses this singularly inappropriate case to announce a *per se* rule that in my judgment has no basis in the applicable statute or jurisprudential principles: that, regardless of the agreement between the parties, if an arbitrator has any prior business relation with one of the parties of which he fails to inform the other party, however innocently, the arbitration award is always subject to being set aside. This is so even where the award is unanimous; where there is no suggestion that the nondisclosure indicates partiality or bias; and where it is conceded that there was in fact no irregularity, unfairness, bias, or partiality. Until the decision today, it has not been the law that an arbitrator's failure to disclose a prior business relationship with one of the parties will compel the setting aside of an arbitration award regardless of the circumstances.[1]

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[1] See *Firemen's Fund Ins. Co.* v. *Flint*, 74 F. 2d 533 (C. A. 4th Cir. 1935); *Texas Eastern Transmission Corp.* v. *Barnard*, 177 F. Supp. 123, 128–129 (D. C. E. D. Kentucky, 1959), rev'd on

I agree that failure of an arbitrator to volunteer information about business dealings with one party will, prima facie, support a claim of partiality or bias. But where there is no suggestion that nondisclosure was calculated, and where the complaining party disclaims any imputation of partiality, bias, or misconduct, the presumption clearly is overcome.[2]

I do not believe that it is either necessary or appropriate, or permissible, to rule, as the Court does, that regardless of the facts, innocent failure to volunteer information constitutes the "evident partiality" necessary under § 10 (b) of the Arbitration Act to set aside an award. "Evident partiality" means what is says: conduct—or at least an attitude or disposition—by the arbitrator favoring one party rather than the other. This case demonstrates that to rule otherwise may be a palpable injustice, since all agree that the arbitrator was innocent of either "evident partiality" or anything approaching it.

Arbitration is essentially consensual and practical. The United States Arbitration Act is obviously designed to protect the integrity of the process with a minimum

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other grounds, 285 F. 2d 536 (C. A. 6th Cir. 1960); *Ilios Shipping & Trading Corp.* v. *American Anthracite & Bituminous Coal Corp.*, 148 F. Supp. 698, 700 (D. C. S. D. N. Y.), aff'd 245 F. 2d 873 (1957); *Cross Properties, Inc.* v. *Gimbel Bros.*, 225 N. Y. S. 2d 1014, aff'd 236 N. Y. S. 2d 61 (1962). Cf. *Isbrandtsen Tankers, Inc.* v. *National Marine Engineers' Beneficial Assn.*, 236 N. Y. S. 2d 808, 811 (1962).

[2] At the time of the contract and the arbitration herein, Rule 18 of the American Arbitration Association, which the Court quotes, was phrased merely in terms of a "request" that the arbitrator "disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator." In 1964, the rule was changed to provide that "the prospective neutral Arbitrator *shall* disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator." (Emphasis supplied.)

of insistence upon set formulae and rules.[3] The Court applies to this process rules applicable to judges and not to a system characterized by dealing-on-faith and reputation for reliability. Such formalism is not contemplated by the Act nor is it warranted in a case where no claim is made of partiality, of unfairness, or of misconduct in any degree.

[3] The reports on the Act make this purpose clear. H. R. Rep. No. 96, 68th Cong., 1st Sess., 1–2; S. Rep. No. 536, 68th Cong., 1st Sess., 3. Cf. *Wilko* v. *Swan*, 346 U. S. 427, 431 (1953).